Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 4, 6, 18, 24, 122, 123, and 162

(T.D. 88–12)

AIR COMMERCE REGULATIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: As part of the general revision of the Customs Regulations, Customs is revising its rules relating to the entry and clearance of aircraft and the transportation of persons and cargo by aircraft. This revision sets forth the general Customs requirements applicable to all air commerce. It is presented in a new format and includes changes or additions in language to clarify various provisions and to make some minor substantive changes.

EFFECTIVE DATE: April 21, 1988.

FOR FURTHER INFORMATION CONTACT: Legal Aspects: Larry L. Burton, Carrier Rulings Branch (202–566–5706). Operational Aspects: Glenn Ross, Office of Inspection and Control (202–566–5607).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Customs has undertaken to review and revise selected parts of the Customs Regulations contained in Chapter I, Title 19, Code of Federal Regulations (19 CFR Chapter I), with the objective of reducing and/or eliminating, to the fullest extent possible, obsolete and unnecessary regulatory requirements. This action was mandated by the Regulatory Flexibility Act, and by the Treasury Department Regulatory Flexibility Review Plan which appeared in the Federal Register on April 14, 1982 (47 FR 16033). As stated in a notice published by Customs in the Federal Register on June 10, 1983 (48 FR 26831), Part 6, Customs Regulations (19 CFR Part 6), is one of those which has been scheduled for revision under the Treasury plan. Before making this revision, Customs published a notice in the Federal Register on July 26, 1985 (50 FR 30455), describing the changes

to be made and inviting public comments. The comments and our analysis are contained in this document.

The revised Part 6, redesignated as Part 122, sets forth all air commerce regulations administered by Customs in a clearly stated new format, which incorporates both current provisions and substantive changes. The major changes from the long-standing air commerce regulations are deletion of the requirement that American-flag aircraft report foreign repairs and pay duty (a change resulting from a provision of the Trade Agreements Act of 1979), and the inclusion of a subpart dealing with requirements relating to aircraft liquor kits. The revision also contains amendments concerning overflight exemptions and reporting requirements which was published as T.D. 86–72 in the Federal Register of March 31, 1986, (51 FR 11004), and T.D. 87–42 published in the Federal Register on March 30, 1987 (52 FR 10047), requirements for access to Customs security areas published as T.D. 86–174 in the Federal Register on September 12, 1986 (51 FR 32448), and elimination of the now defunct international airport at Portal, North Dakota.

Additionally, amendments necessitated by the revision of the Customs bond structure published as T.D. 84–213 in the Federal Register on October 19, 1984 (49 FR 41152), have been incorporated into this revision.

We are aware of the impact of the Anti-Drug Abuse Act of 1986 (Pub. L. 99–570), upon the penalty provisions of the air commerce regulations. Potentially extensive amendments are beyond the scope of this general revision and clarification of existing provisions. Accordingly, any necessary amendments in this regard will be the subject of a separate document.

Revised Part 122 is divided into 17 subparts. Following is information concerning the origins of the various sections as well as a discussion of the major changes in each of the subparts.

§ 122.0 is new and sets forth in general terms the scope and geographic applicability of the revised part.

Subpart A—General Definitions and Provisions

1. § 122.1(a) substitutes the statutory definition of "aircraft" from 49 U.S.C. 1301(5) for the present narrower definition of "civil aircraft."

2. § 122.1(b) is unchanged from § 6.1(e).

3. § 122.1(c) revises § 6.1(g) by substituting the word "agent" for the phrase "authorized person (authorized agent of an owner or operator)."

4. § 122.1(d) is new and clarifies the difference between commercial and non-commercial (private and public) flights.

5. § 122.1(e) clarifies § 6.1(h).

6. § 122.1(f) is new and defines, for the first time, a "landing rights airport."

7. § 122.1(g) is a rephrasing of § 24.18.

8. § 122.1(h) is new and defines "private aircraft."
9. § 122.1(i) is new and defines "public aircraft."
10. § 122.1(j) is new and defines "residue cargo." The definition is loosely derived from § 6.9(a).
11. § 122.1(k) is a rephrasing of § 6.1(f).
12. § 122.1(l) combines § 6.1(b) and (c) and includes Puerto Rico in the definition of "United States."
13. § 122.2 is largely unchanged from § 6.10.
14. § 122.3 is a rephrasing of § 6.6(b).
15. § 122.4 is a rephrasing of § 6.6(a).
16. § 122.5 significantly revises the specific requirements for reproduction of Customs forms found in § 6.6(a).

SUBPART B—INTERNATIONAL AIRPORTS

1. § 122.11(a) rephrases § 6.12(a), (b) and (d).
2. § 122.11(b) is a rephrasing of § 6.12(c).
3. § 122.11(c) is a rephrasing of § 6.12(e).
4. § 122.12(a) is a restatement of § 6.12(f).
5. § 122.12(b) is a restatement of § 6.12(g).
6. § 122.12(c) is a restatement of § 6.12(h).
7. § 122.12(d) is a restatement of § 6.12(i) with deletion of the reference to "Area."
8. § 122.13 is unchanged from § 6.13.
9. § 122.14 is new and is based upon T.D. 86–174, published in the Federal Register on September 12, 1986 (51 FR 32448).

SUBPART C—PRIVATE AIRCRAFT

1. § 122.21 is new and makes the subpart applicable to all private aircraft.
2. § 122.22 makes the landing requirements in § 122.31 applicable to private aircraft.
3. § 122.23(a) is new and is based upon definitions found in the Department of Transportation regulations relating to exemptions for air taxi operations (14 CFR Part 298).
4. § 122.23(b) and (c) is a restatement of § 6.14(a) as amended by T.D. 86–22, published in the Federal Register on March 31, 1986 (51 FR 11004).
5. § 122.24(a) and (b) is a restatement of § 6.14(d) and (g).
6. § 122.25(a), (b), (c) and (d) and (e) is a restatement of § 6.14(f), as amended by T.D. 86–72 and T.D. 87–42.
7. § 122.26 is new and exempts private aircraft from entry and clearance requirements.
8. § 122.27 is partially new and partially a restatement of § 148.5. It sets forth the documentation necessary for declaring baggage and cargo upon arrival of a private aircraft, as well as documentation and requirements for departing with certain cargo not for hire.

9. § 122.28 is based upon § 148.32 and relates to a U.S. resident returning a private aircraft to the U.S. which has been taken abroad for non-commercial purposes.

10. § 122.29 is new and sets forth the changes and procedures relating to overtime services rendered by Customs in connection with an arriving private aircraft. The section is based in part upon § 24.16.

11. § 122.30 is based upon §§ 6.10 and 6.11, and lists other regulatory requirements applying to private aircraft.

SUBPART D—LANDING REQUIREMENTS

1. § 122.31(a) contains a complete rewording and restructuring of § 6.2(b)(1) and sets forth reporting requirements for all non-excepted aircraft arriving from outside the U.S. Exceptions appear in § 122.31(b).

2. § 122.31(b) is based upon § 6.2(b)(3).

3. § 122.31(c)(2) is based upon § 6.2(b)(2).

4. § 122.31(d) is based upon § 6.2(b)(4).

5. § 122.31(e) is based upon § 6.2(b)(5).

6. § 122.31(f) is based upon the second sentence of § 6.2(b)(1).

7. § 122.32 is based upon the first sentence of § 6.2(a).

8. § 122.33 is based upon the second sentence of § 6.2(a). The revision adds reference to two other sections relating to alternative landing sites.

9. § 122.34 is based upon the last three sentences of § 6.2(a).

10. § 122.35 is based upon § 6.2(h).

11. § 122.36 is based upon § 6.2(b)(6).

12. § 122.37 is based upon present § 6.2(h).

13. § 122.38(a) is based upon the sentence of present § 6.2(e) and (f).

14. § 122.38(b) is based upon § 6.2(e) and (f).

15. § 122.38(c) is based upon § 6.2(e) and (f).

16. § 122.38(d) is based upon § 6.2(e) and (f) and provides exceptions for the need to obtain a permit or special license for each arrival or departure.

17. § 122.38(e) is based upon § 6.2(g).

18. § 122.38(f) is new and is based upon Customs Circular INS–2–EV, dated 12/14/61, and provides the procedure for requesting automatic renewal of permits and special licenses.

SUBPART E—AIRCRAFT ENTRY AND ENTRY DOCUMENTS

1. § 122.41 is based upon §§ 6.3(a), 6.4(a) and (b), and 6.9(c).

2. § 122.42 is based upon §§ 6.3(b), 6.4(c), and 6.7.

NOTE: Much of the remainder of Subpart E is based upon § 6.7. It covers all of the various forms required for entry. The revision is structured so that each required form is treated in a separate section.

3. § 122.43(a) and (c) is based upon § 6.7(a) and (b).

4. § 122.43(b) is based upon Customs Circular AIR–4–ICS, dated 1/24/68, and permits entry upon presentation of an air cargo manifest in lieu of a general declaration.

5. § 122.44 is new and is based upon Customs Circular BAG–3–CO (AIR–4–AIR), dated 8/9/65. It states that aircraft crewmembers arriving from a foreign area must file a crew baggage declaration as provided in Subpart G, Part 148, Customs Regulations (19 CFR Part 148).

6. § 122.45 is based upon § 6.7(b)(1) and substitutes "crew list" for "crew manifest."

7. § 122.45(d) is based upon Customs Circular BAG–3–CO, dated 8/9/65, and sets forth requirements for crewmembers returning as passengers.

8. § 122.46(a) is based upon § 6.7(b)(2). The qualifying phrase "for any aircraft required to enter by § 122.41" is added.

9. § 122.46(b) is based upon the last sentence of § 6.7(b)(2), as well as Customs Circular AIR–4–ICS, dated 1/24/68. The section includes a cross-reference to Subpart G, Part 148, Customs Regulations (19 CFR Part 148).

10. § 122.46(c) is based upon the second and third sentences of § 6.7(b)(2). The reference to "attached list" is replaced by "crew purchase list."

11. § 122.47(a) is based upon § 6.7(f).

12. § 122.47(b) is based upon § 6.7(f).

13. § 122.47(c)(1) is based upon § 6.7(b)(3)(v).

14. § 122.47(c)(2) is based upon § 6.7(b)(3)(v) and (vi), and includes major changes. The section specifies that "other domestic supplies" may be omitted from the stores list when an appropriate statement appears on the manifest or stores list. Further, the statement "Aircraft of scheduled airline" is deleted, thus being made applicable to all aircraft required to enter.

15. § 122.47(d) is based upon § 6.7(f).

NOTE: § 122.48 is taken from § 6.7(b)(3). Subparagraphs (v) and (vi) are included in proposed § 122.47(c).

16. § 122.48(a) is based upon § 6.7(b)(3), and the phrase "for any aircraft required to enter under § 122.41" is added for clarification.

17. § 122.48(b) is based upon § 6.7(b)(3). There is no substantive change except as concerns the requirement that company mail be listed on the cargo manifest.

18. § 122.48(c) is based upon § 6.7(b)(3), with the words "duty free" inserted for clarity.

19. § 122.48(d) is based upon § 6.7(b)(3)(vii), as amended by T.D. 84–128, published in the Federal Register on June 4, 1984 (49 FR 23038).

20. § 122.48(e) is new and is based upon Customs Circular AIR–7–IEI, dated 1/31/72. This section concerns accompanied baggage in transit.

21. § 122.49(a) is based upon § 6.7(h)(1) and (2).

22. § 122.49(b) is based upon § 6.7(h)(1) and (3), as well as § 4.12(a). The sections were combined and put in outline form, making it unnecessary to continually refer back to Part 4, Customs Regulations (19 CFR Part 4), to check the applicability of the vessel regulations to aircraft.

23. Paragraphs (c), (d), (e), and (f) of § 122.49 are based upon §§ 6.7(h) and 4.12. The comments relating to § 122.49(b) apply to these paragraphs as well.

NOTE: All reference to the applicability of the vessel repair statute (19 U.S.C. 1466) to repairs made to aircraft, currently reflected in § 6.7(d) and (e), are deleted in Part 122 due to enactment of the Trade Agreements Act of 1979 (Title 6, § 601(a)(3), Pub. L. 96–39), which relieved aircraft from the duty provisions of 19 U.S.C. 1466.

SUBPART F—INTERNATIONAL TRAFFIC PERMIT

1. § 122.51 is based upon § 6.2(d)(3). The word "civil" is deleted and the phrase "passengers carried for hire or merchandise" is replaced by the word "commercial."

2. § 122.52(a) is based upon § 6.2(d)(3). The word "civil" is deleted and the term "commercial aircraft" replaces the term "international traffic."

3. § 122.52(b) is based upon § 6.2(d)(3).

4. § 122.52(c) is based upon the last two sentences of § 6.2(d)(3). The term "international traffic" has been changed to "commercial aircraft."

5. § 122.53 is new and is based upon the Federal Aviation Administration regulations (14 CFR 121.153).

6. § 122.54(a) and (b) is based upon § 6.2(d)(1). The term "or agent" is added to paragraph (b), and necessary information is listed for inclusion on Customs Form 7507 (Permit to Proceed).

7. § 122.54(c) is based upon § 6.2(d)(1).

8. § 122.54(d), (e) and (f) is based upon § 6.2(d)(1).

9. § 122.54(g) is based upon § 6.2(d)(2).

SUBPART G—CLEARANCE OF AIRCRAFT AND PERMISSION TO DEPART

1. § 122.61 is based upon § 6.3(c) and includes a general statement covering all aircraft except public and private.

2. § 122.62(a), (b) and (c) is based upon the third, fourth, and fifth sentences of § 6.3(c), and names those aircraft not otherwise required to clear.

3. § 122.63(a) is based upon § 6.5(c).

4. § 122.63(b) is based upon § 6.5(c).

5. § 122.64 is based upon § 6.3(d) and is largely a restatement of § 122.63(a) and (b), but deals with aircraft not using the procedure outlined therein.

6. § 122.65 is new and provides that aircraft commanders must notify Customs if departure is delayed or cancelled after the aircraft has been cleared or given permission to depart.

SUBPART H—DOCUMENTS REQUIRED FOR CLEARANCE AND PERMISSION TO DEPART

1. § 122.71 is based upon § 6.8(a) and rephrases the telephonic clearance procedures, added by T.D. 82–92, published in the Federal Register on May 14, 1982 (47 FR 20750).

2. § 122.72 is based upon § 6.8(a).

3. § 122.73 is based upon § 6.8(b) and T.D. 82–92, and concerns the form and preparation of air cargo manifests.

4. § 122.74(a) is based upon § 6.8(a) and the Bureau of the Census regulations (15 CFR 30.24). The term "Customs officer in charge" is changed to "district director."

5. § 122.74(b) is based upon § 6.8(a). The term "Customs officer in charge" is changed to "district director."

6. § 122.74(c) is based upon § 6.8(a) and 15 CFR 30.24(a).

7. § 122.74(c)(1) is based upon § 6.8(a) and 15 CFR 30.24(a), and concerns shipments to foreign countries.

8. § 122.74(c)(2) is based upon § 6.8(e) and 15 CFR 30.24(a)(1), and concerns shipments to and from Puerto Rico.

9. § 122.74(c)(3) is based upon § 6.8(a) and 15 CFR 30.24(a)(1), and concerns shipments to U.S. possessions.

10. § 122.74(d) is based upon § 6.8(e). The phrase "or all required cargo documents will be filed within the 7-day bond period" is added.

11. § 122.75(a)(1) and (2) is based upon § 6.8(e) and 15 CFR 30.21(b), and concerns the contents of a complete air cargo manifest.

12. § 122.75(b) is based upon the third and fourth sentences of § 6.8(e).

13. § 122.76 is based upon § 6.8(a) and 15 CFR 30.1, and sets forth the requirements for Shipper's Export Declarations.

14. § 122.77 is based upon § 6.8(d).

15. § 122.78 is based upon § 6.8(c). The phrase "cargo manifest" replaces "outward manifest."

16. § 122.79(a) is based upon §§ 6.5(b) and 6.3(c), and concerns shipments to U.S. possessions, other than Puerto Rico.

17. § 122.79(b) is based upon §§ 6.5(b) and 6.3(c), and concerns manifest requirements on direct flights to Puerto Rico.

18. § 122.80 is based upon § 6.8(e), and concerns verification by Customs of statements made on shipping records.

SUBPART I—PROCEDURES FOR RESIDUE CARGO AND STOPOVER PASSENGERS

1. § 122.81 is based upon § 6.9(a).

2. § 122.82 is based upon the §§ 6.9(a), 4.85(a), 133.13(a) and (b), and 113.61, and details the bond requirement for aircraft seeking a permit to proceed while carrying residue cargo.

3. § 122.83(a) is based upon § 6.9(b), footnote 6. The term "area" is deleted, and the phrase "an authorized person" is replaced by the word "agent."

4. § 122.83(b) is based upon § 6.9(b), and includes a provision for crew purchases and stores lists, as well as alternate procedures for unlisted items.

5. § 122.83(c) is based upon § 6.9(b). The clarifying phrase "An abstract general declaration and manifest need not be filed at the last domestic port of discharge" is added.

6. § 122.83(d) is based upon § 6.9(b), and relates to the contents of a permit to proceed. The word "agent" replaces the phrase "authorized person", and the phrase "Customs officer in charge" replaces "appropriate Customs officer."

7. § 122.83(e) is based upon § 6.9, and includes a reproduction of Customs Form 7512–C, Permit to Proceed.

8. § 122.83(f) is based upon § 6.9(b). The phrase "The documents presented by the aircraft commander or authorized person when applying for clearance shall be delivered to the aircraft commander" is replaced by "* * * must be delivered to aircraft commander or agent." The word "agent" replaces the phrase "authorized person."

9. § 122.84(a) and (b) is based upon § 6.9(c).

10. § 122.84(c) is based upon § 6.9(c). The section provides that declarations are to be detached by Customs.

11. § 122.84(d) is based upon § 6.9(c), and concerns departure from an intermediate airport.

12. § 122.85 is based upon § 6.9(d). It concerns arrival at the final airport.

13. § 122.86 is new and is based upon Customs Circular AIR–7–EV, dated 11/23/59. It concerns the substitution of aircraft under the residue cargo procedures.

14. § 122.87 is based upon § 6.9(e).

15. § 122.88 is based upon § 6.9(f).

SUBPART J—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

1. § 122.91 is based upon § 6.15(a).

2. § 122.92(a) and (b) is based upon § 6.15(b)(1) and (2).

3. § 122.92(c) is based upon § 6.15(b)(3).

4. § 122.92(d) is based upon § 6.15(b)(4).

5. § 122.92(e) is based upon § 6.15(b)(5), and the phrase "aircraft of the same line" is changed to "aircraft of the same airline."

6. § 122.92(f) is based upon the first sentence of § 6.15(b)(6).

7. § 122.92(g) is based upon the second sentence of § 6.15(b)(6).

8. § 122.93(a) is based upon § 6.15(c). The word "port" is changed to "airport", the phrase "authorized person" is replaced by the word "agent", and reference to appropriate Customs forms is inserted.

9. § 122.93(b) is based upon § 6.15.

10. § 122.94(a) is based upon § 6.16.

11. § 122.94(b) is based upon § 6.16, and the phrase "authorized person" is replaced by the word "agent."
12. § 122.95 is based upon footnote 9 of § 6.15(a).

SUBPART K—ACCOMPANIED BAGGAGE IN TRANSIT

1. § 122.101 and 122.102 are new and are based upon Customs Circular AIR–7–IEI, dated 1/31/72. These sections concern entry and inspection of accompanied baggage in transit.

SUBPART L—TRANSIT AIR CARGO MANIFEST (TACM) PROCEDURES

1. § 122.111 is based upon § 6.17.
2. § 122.112(a), (b) and (c) is based upon the definition portion of § 6.17.
3. § 122.112(d) is based upon § 6.18(a), and defines the use of the transit air cargo manifest.
4. § 122.113 is based upon § 6.18(a), and discusses the form used for transit air cargo manifest procedures.
5. § 122.114(a) is based upon the last sentence of § 6.18(a), and Customs Circular AIR—7—EV, dated 5/8/62.
6. § 122.114(b) is based upon the first sentence of § 6.18(b).
7. § 122.114(b)(2) is based upon the second sentence of § 6.18(b).
8. § 122.114(c) is based upon § 6.18(d).
9. § 122.114(d) is based upon Customs Circular AIR–7–EV, dated 5/8/62, and concerns corrections to the route shown on the original manifest.
10. § 122.115 is based upon § 6.18(e) and Customs Circular AIR–7–EV, dated 5/8/62. The section concerns labeling of cargo.
11. § 122.116 is based upon § 6.19.
12. § 122.117(a)(1) is based upon the first sentence of § 6.20(c).
13. § 122.117(a)(2) is based upon the second sentence of § 6.20(c).
14. § 122.117(b) is based upon § 6.20(b) and (d).
15. § 122.117(c)(1) is based upon § 6.20(c) and concerns responsibility for direct exportation of transit air cargo.
16. § 122.117(c)(2) is based upon the fourth sentence of § 6.20(c).
17. § 122.117(c)(3) is based upon the last sentence of § 6.20(c). § 122.17(c)(4) is based upon the third sentence of § 6.20(c).
18. § 122.117(d) is based upon § 6.20(e) and concerns receipts for split shipments.
19. § 122.118(a) is based upon § 6.24(a). All material in the section following the phrase "in the United States" is deleted and the words "under this section" are added.
20. § 122.118(b) is based upon § 6.21(c).
21. § 122.118(c) is based upon § 6.24(b) and (c).
22. § 122.118(d) is based upon § 6.24(g) with the phrase "air carrier" being replaced by the word "airline."
23. § 122.118(f) is based upon Customs Circular AIR–7–CO, dated 3/17/65. It concerns the exportation of post-entered air cargo.
24. § 122.118(g) is based upon § 6.24(d).

25. § 122.119(a) is based upon § 6.22(a).
26. § 122.119(b) is based upon § 6.21(a).
27. § 122.119(c) is based upon § 6.22(a) and Customs Circular TRA–1–IMS, dated 7/15/68.
28. § 122.119(d)(1) and (2) is based upon § 6.22(c) and (d), and concerns failure to deliver transit air cargo in a timely fashion.
29. § 122.119(e) is new and concerns the transfer of cargo between carriers.
30. § 122.120(a) is based upon § 6.23(a) and establishes the authority for transporting cargo to another port for exportation.
31. § 122.120(b)(1) is based upon the first sentence of § 6.23(a).
32. § 122.120(b)(2) is based upon the second sentence of § 6.23(c). The phrase "when the goods are ready for lading" is replaced by the phrase "when transit air cargo is ready for lading."
33. § 122.120(c) is based upon § 6.21(b), and concerns the time limit for delivery of transit air cargo for exportation.
34. § 122.120(d) is based upon § 6.23 and sets forth new procedures for using Customs Form 7512–C.
35. § 122.120(e) is based upon § 6.23(b) and details the requirements for presentation of the carrier manifest copy.
36. § 122.120(f) is based upon the first sentence of § 6.23(c).
37. § 122.120(g) is based upon § 6.23(e).
38. § 122.120(h) is based upon § 6.23(d). The phrase "these documents (including the clearance copies of transit air cargo manifest)" is replaced by the phrase "the exportation and clearance copies of transit air cargo manifests."
39. § 122.120(i) is based upon § 6.23(h).
40. § 122.120(j) is based upon § 6.23(h) and concerns cargo laden on more than one aircraft of the same airline.
41. § 122.120(k) is based upon § 6.27(g).

Subpart M—Aircraft Liquor Kits

NOTE: §§ 122.131 through 122.137, the aircraft liquor kit provisions, do not appear in Part 6, Customs Regulations. The Subpart is based upon Customs Circular AIR–7–AIR, dated 6/16/64.

Subpart N—Flights To and From the U.S. Virgin Islands

1. § 122.141 is a new definition section, inserted to help clarify the subpart.
2. § 122.142 is based upon § 6.25(a).
3. § 122.143 is based upon § 6.25(b).
4. § 122.144(a)(1) is based upon § 6.25(c)(1).
5. § 122.144(a)(2) is based upon § 6.25(c)(2).
6. § 122.144(b) is based upon § 6.25(c)(3).
7. § 122.144(c) is based upon § 6.25(c)(4).

SUBPART O—FLIGHTS TO AND FROM CUBA

§§ 122.151 through 122.158 are based upon § 6.3a, as amended by T.D. 87–77, published in the Federal Register on June 30, 1987. (52 FR 24291).

SUBPART P—PUBLIC AIRCRAFT

[Reserved]

SUBPART Q—PENALTIES

1. § 122.161 is based upon § 6.11.
2. § 122.162 is based upon § 6.7(h).
3. § 122.163 is based upon § 6.22(e).
4. § 122.164 is based upon § 6.23(g).
5. § 122.165 is new and is based upon Customs Circular AIR–4–CR, dated 11/12/72. It concerns the Air Cabotage statute, 49 U.S.C. App. 1508(b).
6. § 122.166 is new and is based upon amendments to 19 U.S.C. 1433 and 1436.
7. § 122.167 is new and is based upon amendments to 19 U.S.C. 1433 and 1436.

EDITORIAL CHANGES

Throughout the revision, numerous editorial changes have been made to clarify and simplify the language contained in the existing air commerce regulations.

ANALYSIS OF COMMENTS

Only six comments were received in response to the July 26, 1985, Federal Register notice. Of these, two were from aircraft and airline industry associations, two from Federal Government offices, one from a customs broker, and one from an aircraft importer.

Two commenters stated that the requirements in § 122.23, relating to 1-hour advance notice of penetration of U.S. airspace by private aircraft arriving from areas south of the U.S., are burdensome, and that compliance may be impossible in some instances.

As discussed in T.D. 86–72, published in the Federal Register on March 3, 1986 (51 FR 11004), Customs changed the notice time in § 6.14 from 15-minutes to 1-hour after very careful consideration of the effect and impact of such a change. The revised reporting time was determined to be necessary for valid enforcement reasons. If the 1-hour time period proves unworkable for some aircraft operators, Customs will consider accepting notification of intended airspace penetration when a flight plan is filed with the Federal Aviation Administration or at any time prior to departure from the U.S.

A discussion of the other sections commented upon follows.

§ 122.2(c)(1) and (2). (renumbered § 122.1(c)(1) and (2) in this document). Companies acting as an agent for an airline temporarily importing an aircraft for modifications, or, if a used aircraft, being

traded in for a new one, should be permitted to act as an agent for the airline without holding a power of attorney or without having written authority from the airline. This comment is outside the scope of this revision. Relevant procedures for these matters are set forth in § 10.36a, Customs Regulations (19 CFR 10.36a).

§ 122.6(b). (renumbered § 122.5(b) in this document). Airlines need to have flexibility in determining the size, shape, and color of general declaration and air cargo manifest forms to conform with other private sector documents.

The requirements in § 6.6, upon which § 122.6 is based, were amended by T.D. 85–157, published in the Federal Register on September 19, 1985 (50 FR 37996). The amendment permits private sector printing of the forms so long as the same size, wording arrangement, style and size of type, and quality of paper are used.

§ 122.13. The list of international airports should be revised frequently.

This section is unchanged from § 6.13. The comment is not relevant to this revision. Changes to the list are made as needed.

§ 122.23(b). The requirement that advance notice of U.S. airspace penetration be made by aircraft arriving from the south, even though not touching foreign territory, is unduly burdensome.

As stated earlier in this document, the amendment to § 6.14 by T.D. 86–72 represents a necessary enforcement requirement. However, Customs will continue to accept the notification either prior to or during such a flight.

§ 122.24. Houston Intercontinental Airport should be added to the list of designated airports.

As no explanation or justification was offered, no such action will be taken at this time.

§ 122.25. The section should be changed to permit air ambulances to get single flight exemptions from special landing requirements without the necessity of notification 15 days in advance.

Such exemption may be granted in the discretion of the appropriate district director.

§ 122.27. The minimum dollar amount for which landing certificates or copies of foreign customs entries for merchandise must be filed should be changed from $100 to $500.

As this suggestion has merit, it has been adopted.

§ 122.29. The question is posed as to why Customs overtime charges apply to aircraft and not to vehicles.

This is because service is provided 24 hours a day to aircraft and vessels. The service is free during normal working hours, but must be reimbursed at other times. Automobiles must arrive at Customs border stations during regular hours of operation only and no service is provided during other times.

§ 122.34. Landing rights airports should be required to provide proper office and other space for use by Federal officials.

Authority for such a requirement is found in 31 U.S.C. 9701, and airports provide the necessary space for use by the Federal Inspection Services.

§ *122.34(a)(1).* The words "or his representative" should be added to the section to indicate that the regional commissioner need not personally grant landing rights.

This suggestion has been adopted.

§ *122.42.* The section should be changed to permit aircraft to land for refueling only, without the need to formally enter.

As the suggestion has merit, it has been adopted. The section has been changed to set forth certain conditions which must be met for aircraft to be excepted from the entry requirement.

§ *122.46.* The section, which concerns crew purchase lists, should be changed to reflect contemporary procedures.

We believe that the section is properly drafted at present because, while it is true that a crew purchase list is rarely used, the requirement should be retained as an optional procedure for crewmember declarations.

§ *122.48.* The following changes were suggested: Airline company mail should be considered "baggage" without the necessity to include it on a manifest. Reference to Customs Form 5119A should be changed to 7501. The third sentence of paragraph (d) should be changed to read "* * * added to the cargo list * * *", rather than "* * * shown on the cargo manifest." Finally, the second sentence of paragraph (e) should be changed to "* * * while in transit through the U.S." instead of "* * * during the flight."

Customs believes that company mail should continue to be manifested as cargo and be subject to examination. The remaining points are well taken, and appropriate changes have been made.

§ *122.49.* The section should provide for corrections made to air waybills as well as air cargo manifests.

We agree and have amended the section accordingly.

§ *122.52(c).* Paragraph (c) should be changed to read, in appropriate part, "* * * carrying neither passengers nor cargo", in lieu of the words "* * * in ballast."

We agree and have made the necessary change.

Subpart F. The subpart title should be changed to avoid confusion with Subpart I.

We agree and have changed the title.

Subpart H. The subpart should include the requirements for an outward general declaration, Customs Form 7507.

This was an inadvertent omission which has been corrected.

§ *122.65.* The section should include mention of a time limit within which an aircraft must depart after receiving clearance to depart.

The suggestion has been adopted and the section has been appropriately amended.

§ *122.71.* The section is burdensome because it requires an aircraft to depart only from an airport where Customs officers are stationed.

This is an incorrect interpretation. Aircraft departing with no commercial export cargo may clear by telephone in advance with the district director nearest the departure place.

§ *122.83(d).* The "permit to proceed" form printed in the section should be changed in two respects. First, the phrase "number of pieces of cargo not cleared" should be deleted because it has no application to aircraft which can now accommodate up to 60 breakbulk containers, and the counting of pieces is not done the same way at any two airports. Secondly, reference to Public Health Service (PHS) clearance should be deleted because PHS personnel no longer routinely inspect arriving passengers.

We concur in the first suggestion and have modified the form accordingly. We have contacted the PHS regarding the second suggestion and as they have no objection to deletion of the requirement, this change has also been made.

§ *122.86(d)(2).* The last sentence, which reads, "No other cargo may be laden on the substitute aircraft.", should be deleted.

This sentence was inserted to insure that foreign aircraft are not used in violation of the air cabotage law, prohibiting certain air transit within the U.S. However, as the Federal Aviation Administration, which is responsible for this requirement, did not object to the suggestion, the change has been made.

§ *122.92(a) and (b).* Customs Form 7520, Manifest of Baggage Shipped in Bond, should be described in the section, and the requirement for submitting both the Customs Form 7512 and Customs Form 7512–C should be deleted.

Use of the CF 7520 is described in § 18.13, Customs Regulations (19 CFR 18.13), and we have added an appropriate reference to that section. In regard to the requirement that both the CF 7512 and CF 7512–C be completed for in-bond merchandise, it has been determined that the information on the CF 7512–C is easier to read and use than that on the CF 7512. Accordingly, at this time, the requirement that both forms be submitted is being retained.

§ *122.115.* The warning label procedure in regard to transit air cargo not directly exported from the port of arrival is impractical and should be dropped.

Customs continues to experience problems associated with the unauthorized delivery of in-bond merchandise. Therefore, we must continue to require that the warning label be affixed to all such shipments which are not sealed.

Conforming Amendments

The revision of the air commerce regulations by elimination of Part 6, Customs Regulations (19 CFR Part 6), and the addition of a new Part 122, Customs Regulations (19 CFR Part 122), requires that

certain non-substantive amendments be made to other parts of the Customs Regulations to conform them to the revised scheme. These amendments consist wholly of changing citations to Part 6 to the appropriate citations in Part 122 wherever they appear.

Regulatory Flexibility Act

Pursuant to the provisions of § 605(b) of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601, *et seq.*), it is certified that this revision will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in § 1(b) of E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Drafting Information

The principal author of this document was Larry L. Burton, Office of Regulations and Rulings, Customs Headquarters. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 122

Air carriers, Air transportation, Aircraft, Airports, Cuba, Freight.

PART 6—AIR COMMERCE REGULATIONS

Chapter I of Title 19, Code of Federal Regulations, is amended by removing Part 6 (19 CFR Part 6).

Chapter I of Title 19, Code of Federal Regulations, is further amended by adding a new part, Part 122, to read as follows:

PART 122—AIR COMMERCE REGULATIONS

122.0 Scope

SUBPART A—GENERAL DEFINITIONS AND PROVISIONS

Sec.

122.1 General definitions.
122.2 Other Customs laws and regulations.
122.3 Availability of forms.
122.4 English language required.
122.5 Reproduction of Customs forms.

SUBPART B—INTERNATIONAL AIRPORTS

Sec.

122.11 Designation as international airport.
122.12 Operation of international airports.
122.13 List of international airports.
122.14 Access to Customs Security Areas.

SUBPART C—PRIVATE AIRCRAFT

SUBPART D—LANDING REQUIREMENT

SUBPART E—AIRCRAFT ENTRY AND ENTRY DOCUMENTS

SUBPART F—INTERNATIONAL TRAFFIC PERMIT

SUBPART G—CLEARANCE OF AIRCRAFT AND PERMISSION TO DEPART

SUBPART H—DOCUMENTS REQUIRED FOR CLEARANCE AND PERMISSION TO DEPART

SUBPART H—Continued

SUBPART I—PROCEDURES FOR RESIDUE CARGO AND STOPOVER PASSENGERS

SUBPART J—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

SUBPART K—ACCOMPANIED BAGGAGE IN TRANSIT

SUBPART L—TRANSIT AIR CARGO MANIFEST (TACM) PROCEDURES

SUBPART M—AIRCRAFT LIQUOR KITS

SUBPART N—FLIGHTS TO AND FROM THE U.S. VIRGIN ISLANDS

SUBPART O—FLIGHTS TO AND FROM CUBA

SUBPART P—PUBLIC AIRCRAFT

SUBPART Q—PENALTIES

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1433, 1436, 1459, 1590, 1594, 1624, 1644, 49 U.S.C. App. 1509.

§ 122.0 Scope.

The regulations in this part relate to the entry and clearance of aircraft, and the transportation of persons and cargo by aircraft, and are applicable to all air commerce. They do not apply to Guam, Midway, American Samoa, Wake, Kingman Reef, Johnston Island, and other insular possessions of the U.S. not specified herein. They do apply to the U.S. Virgin Islands as stated in Subpart N (§§ 122.141–122.144), and Cuba as stated in Subpart O (§§ 122.151–122.158).

SUBPART A—GENERAL DEFINITIONS AND PROVISIONS

§ 122.1 General definitions.

The following definitions apply in this part, unless otherwise stated:

(a) *Aircraft.* An "aircraft" is any device now known, or hereafter invented, used, or designed for navigation or flight in the air. It does not include hovercraft.

(b) *Aircraft commander.* An "aircraft commander" is any person serving on an aircraft who is in charge or has command of its operation and navigation.

(c) *Agent.* An "agent" is any person who is authorized to act for or in place of:

(1) An owner or operator of a scheduled airline by written authority; or

(2) An owner or operator of a non-scheduled airline, by power of attorney.

The authority to act shall be in writing and satisfactory to the district director.

(d) *Commercial aircraft.* A "commercial aircraft" is any aircraft transporting passengers and/or cargo for some payment or other consideration, including money or services rendered.

(e) *International airport.* An "international airport" is any airport designated by:

(1) The Secretary of the Treasury or the Commissioner of Customs as a port of entry for aircraft arriving in the U.S. from any place outside thereof and for the merchandise carried on such aircraft;

(2) The Attorney General as a port of entry for aliens arriving on such aircraft; and

(3) The Secretary of Health and Human Services as a place for quarantine inspection.

(f) *Landing rights airport.* A "landing rights airport" is any airport, other than an international airport, at which flights from a foreign area may be allowed to land.

(g) *Preclearance.* "Preclearance" is the examination and inspection of air travelers and their baggage, at the request of an airline, at foreign places where Customs personnel are stationed for that purpose. Preclearance may be used only for air travelers and their baggage, not for merchandise.

(h) *Private aircraft.* A "private aircraft" is any aircraft engaged in a personal or business flight to or from the U.S. which is not:

(1) carrying passengers and/or cargo for commercial purposes;

(2) leaving the U.S. carrying neither passengers nor cargo in order to lade passengers and/or cargo in a foreign area for commercial purposes; or

(3) returning to the U.S. carrying neither passengers nor cargo in ballast after leaving with passengers and/or cargo for commercial purposes;

(i) *Public aircraft.* A "public aircraft", is any aircraft owned by, or under the complete control and management of the U.S. government or any of its agencies, or any aircraft owned by or under the complete control and management of any foreign government which exempts public aircraft of the U.S. from arrival, entry and clearance requirements similar to those provided in Subpart C of this part, but not including any government owned aircraft engaged

in carrying persons or property for commercial purposes. This definition applies if the aircraft is:

(1) manned entirely by members of the armed forces or civil service of such government, or by both;

(2) transporting only property of such government, or passengers traveling on official business of such government; or

(3) carrying neither passengers nor cargo.

(j) *Residue cargo.* "Residue cargo" is any cargo on board an aircraft arriving in the U.S. from a foreign area if the:

(1) final delivery airport in the U.S. is not the port of arrival; or

(2) cargo remains on board the aircraft and travels from port to port in the U.S., for final delivery in a foreign area.

(k) *Scheduled airline.* A "scheduled airline" is any individual, partnership, corporation or association:

(1) engaged in air transportation under regular schedules to, over, away from, or within the U.S.; and

(2) holding a Foreign Air Carrier Permit or a Certificate of Public Convenience and Necessity, issued by the Department of Transportation pursuant to 14 CFR 201 and 213.

(l) *United States.* Except when used in another context, "U.S." means the territory of the several States, the District of Columbia, and Puerto Rico, including the territorial waters and overlying airspace.

§ 122.2 Other Customs laws and regulations.

Except as otherwise provided for in this chapter, and insofar as such laws and regulations are applicable, aircraft arriving or having arrived from or departing for any foreign port or place, and the persons and merchandise, including baggage, carried thereon, shall be subject to the laws and regulations applicable to vessels to the extent that such laws and regulations are administered or enforced by Customs, as provided in 49 U.S.C. App. 1509(c).

§ 122.3 Availability of forms.

The forms mentioned in this part may be purchased from the district director at a port of entry. A small quantity of each form is set aside by district directors for free distribution and official use.

§ 122.4 English language required.

A translation in the English language shall be attached to the original and each copy of any form or document written or printed in a foreign language.

§ 122.5 Reproduction of Customs forms.

(a) *Specifications.* Subject to approval by Customs, the forms mentioned in this Part may be printed by private parties if the specified size, wording arrangement, style and size of type, and quality of paper are used.

(b) *Exceptions.* District directors may accept privately printed copies of the General Declaration (Customs Form 7507) and air cargo manifest (Customs Form 7509) which are different from the official forms. The privately printed forms shall include all information required on the official forms. The differences allowed are:

(1) *General Declaration.* Customs Form 7507 may be printed in several languages, so long as the form includes an English version. The instructions on the reverse side of the official form may be omitted.

(2) *Air cargo manifest.* Customs Form 7509 may be changed to allow for additional information used by the airline.

SUBPART B—INTERNATIONAL AIRPORTS

§ 122.11 Designation as international airport.

(a) *Procedure.* International airports, as defined in § 122.1(e), will be designated after due investigation to establish that sufficient need exists in any particular district or area to justify such designation and to determine the airport best suited for such purpose. In each case, a specific airport will be chosen, rather than a general area or district. International airports will be publicly owned, unless circumstances require otherwise.

(b) *Withdrawal of designation.* The designation as an international airport may be withdrawn for any of the following reasons:

(1) the amount of business clearing through the airport does not justify maintenance of inspection equipment and personnel;

(2) proper facilities are not provided or maintained by the airport;

(3) the rules and regulations of the Federal Government are not followed; or

(4) some other location would be more useful.

(c) *Providing office space to the Federal Government.* Each international airport shall provide, without cost to the Federal Government, proper office and other space for the sole use of Federal officials working at the airport. A suitable paved loading area shall be supplied by each airport at a place convenient to the office space. The loading area shall be kept for the use of aircraft entering or clearing through the airport.

§ 122.12 Operation of international airports.

(a) *Entry, clearance and charges.* International airports are open to all aircraft for entry and clearance at no charge by Customs. However, charges may be assessed by the airport for commercial or private use of the airport.

(b) *Servicing of aircraft.* When an aircraft enters or clears through an international airport, it shall be promptly serviced by airport personnel solely on the basis of order of arrival or readiness for departure. Servicing charges imposed by the airport operators

shall not be greater than the schedule of charges in effect at the airport in question.

(c) *Federal Aviation Administration rules.* International airports shall follow and enforce any requirements for airport operations, including airport rules, that are set out by the Federal Aviation Administration in 14 CFR Part 91.

(d) *Additional requirements.* Additional requirements may be put into effect at a particular airport as the needs of the Customs district served by the airport demand.

§ 122.13 List of international airports.

The following is a list of international airports of entry designated by the Secretary of the Treasury:

Location	Name
Akron, Ohio	Akron Municipal Airport.
Albany, N.Y.	Albany County Airport.
Baudette, Minn.	Baudette International Airport.
Bellingham, Wash.	Bellingham International Airport.
Brownsville, Tex.	Brownsville International Airport.
Burlington, Vt.	Burlington International Airport.
Calexico, Calif.	Calexico International Airport.
Caribou, Maine	Caribou Municipal Airport.
Chicago, Ill.	Midway Airport.
Cleveland, Ohio	Cleveland Hopkins International Airport.
Cut Bank, Mont.	Cut Bank Airport.
Del Rio, Tex.	Del Rio International Airport.
Detroit, Mich.	Detroit City Airport.
Detroit, Mich.	Detroit Metropolitan Wayne County Airport.
Douglas, Ariz.	Bisbee-Douglas International Airport.
Duluth, Minn.	Duluth International Airport.
Duluth, Minn.	Sky Harbor Airport.
Eagle Pass, Tex.	Eagle Pass Municipal Airport.
El Paso, Tex.	El Paso International Airport.
Fort Lauderdale, Fla.	Fort Lauderdale-Hollywood International Airport.
Friday Harbor, Wash.	Friday Harbor Seaplane Base.
Grand Forks, N.Dak.	Grand Forks International Airport.
Great Falls, Mont.	Great Falls International Airport.
Havre, Mont.	Havre City-County Airport.
Houlton, Maine	Houlton International Airport.
International Falls, Minn.	Falls International Airport.
Juneau, Alaska	Juneau Municipal Airport.
Juneau, Alaska	Juneau Harbor Seaplane Base.
Ketchikan, Alaska	Ketchikan Harbor Seaplane Base.
Key West, Fla.	Key West International Airport.
Laredo, Tex.	Laredo International Airport.
Massena, N.Y.	Richards Field.
McAllen, Tex.	Miller International Airport.
Miami, Fla.	Chalk Seaplane Base.
Miami, Fla.	Miami International Airport.
Minot, N.Dak.	Minot International Airport.
Nogales, Ariz.	Nogales International Airport.
Ogdensburg, N.Y.	Ogdensburg Harbor.
Ogdensburg, N.Y.	Ogdensburg International Airport.
Oroville, Wash.	Dorothy Scott Airport.
Oroville, Wash.	Dorothy Scott Seaplane Base.
Pembina, N.Dak.	Pembina Municipal Airport.
Port Huron, Mich.	St. Clair County International Airport.

Location	Name
Port Townsend, Wash.	Jefferson County International Airport.
Ranier, Minn.	Ranier International Seaplane Base.
Rochester, N.Y.	Rochester-Monroe County Airport.
Rouses Point, N.Y.	Rouses Point Seaplane Base.
San Diego, Calif.	San Diego International Airport (Lindbergh Field).
Sandusky, Ohio	Griffing-Sandusky Airport.
Sault Ste. Marie, Mich.	Sault Ste. Marie City-County Airport.
Seattle, Wash.	King County International Airport.
Seattle, Wash.	Lake Union Air Service (Seaplanes).
Tampa, Fla.	Tampa International Airport.
Tucson, Ariz.	Tucson International Airport.
Watertown, N.Y.	Watertown New York International Airport.
West Palm Beach, Fla.	Palm Beach International Airport.
Williston, N. Dak.	Sloulin Field International Airport.
Wrangell, Alaska	Wrangell Seaplane Base.
Yuma, Ariz.	Yuma International Airport.

§ 122.14 Access to Customs security areas.

(a) For the purposes of this section, the term "Customs security area" means the Federal inspection services area (as provided for by § 122.11(c)), designated for processing passengers, crew, their baggage and effects arriving from foreign countries, as well as the aircraft deplaning and ramp area and other restricted areas designated by the district director of Customs. These areas will be posted as restricted to the extent possible, and are established for the purpose of prohibiting unauthorized entries or contact with persons or objects.

(b) With the exception of all Federal, and uniformed State and local law enforcement personnel, all persons located at, operating out of, or employed by any airport accommodating international air commerce, or its tenants or contractors, including air carriers, who have unescorted access to the Customs security area must openly display or produce upon demand, an approved identification card, strip, or seal, to be issued by Customs. The approved identification card, strip, or seal shall be in the possession of the person in whose name it is issued at all times when the person is in the Customs security area. The identification strip or seal or any Customs issued card remains the property of Customs and any bearer must immediately surrender it upon demand by any authorized Customs officer.

(c) An application for an approved identification card, strip, or seal as required by this section, shall be filed by the applicant with the district director on Customs Form 3078. This requirement applies to all employees, regardless of the length of their employment. For employees hired on or after November 1, 1985, an authorized official of the employer shall attest in writing that a background check has been conducted on the applicant. The background check shall include, at a minimum, investigation of references and employment history to the extent necessary to verify representations made by the applicant relating to employment in the preceding 5 years. For any employee hired before November 1, 1985, the autho-

rized official of the employer need only attest to the fact that the employee was hired before that date. The authorized official of the employer shall attest that, to the best of his knowledge, the applicant meets the conditions necessary to perform functions associated with employment in the Customs security area. The fingerprints of the applicant may be required on FD 258 at the time of the filing of the application. Proof of citizenship or authorized residency, and a photograph may also be required. In addition, the application may be investigated by Customs and a report prepared concerning the character of the applicant. Records of background investigations conducted by employers must be retained by them and made available upon request by the district director for a period of 1 year following cessation of employment of the employees.

(d) Law enforcement officers and other Federal, State, or local officials whose duties require access to the Customs security area may request from the district director the issuance of an approved identification card, strip, or seal. They need not make application nor submit to background checks for security area access.

(e)(1) An approved identification card, strip, or seal shall not be issued to any person whose employment necessitates access to the Customs security area and whose access will, in the judgment of the district director, endanger the revenue or the security of the area. Grounds for denial of access shall include, but are not limited to:

(i) Any cause which would justify suspension or revocation of the identification card, strip, or seal under the provisions of paragraph (j) of this section; or

(ii) Evidence of a pending or past investigation which establishes criminal, or dishonest conduct, or a verified record of such conduct.

(2)(i) The district director shall give written notification to any person whose application for access to the Customs security area has been denied, fully stating the reasons for denial and setting forth specific appeal procedures. The employer shall be notified in writing that the applicant has been denied access to the area and that the detailed reasons for the denial have been furnished to the applicant. Specific reasons for denial shall not be furnished to the employer.

(ii) The denial will be final unless the applicant files with the district director a written notice of appeal. The applicant's written notice must be filed within 10 days following receipt of the notice of denial. The notice of appeal shall be filed in duplicate, and shall set forth the response of the applicant to the statement of the district director. The district director shall render his decision on the appeal to the applicant within 30 days of receipt of the notice of appeal.

(iii) If the district director denies the application on appeal, the applicant may file a further written notice of appeal to the Commissioner within 10 days of receipt of the district director's decision on the appeal. The further notice of appeal shall be filed in duplicate,

and shall set forth the response of the applicant to the district director's decision. The Commissioner or his designee shall review the appeal, and render a written decision. This final decision shall be transmitted to the district director and served by him on the applicant.

(f) An employee may obtain a new identification card, strip, or seal from the district director in the following circumstances, without completing a new application, except as determined by the district director in his discretion:

(1) A change in employee name or address;

(2) A change in the name or ownership of his employing company;

(3) A change in employer or airport authority identification card format; or

(4) Loss or theft of the identification card, strip, or seal.

(g) The identification card, strip, or seal shall be removed from the employee by the district directory when, for security reasons, it is necessary to change the nature of the identification.

(h) The loss or theft of an identification card, strip, or seal shall be promptly reported in writing by the employee to the district director, and the card, strip, or seal may be replaced as provided in paragraph (f) of this section.

(i) If an approved identification card, strip, or seal is presented by a person other than the one to whom it was issued, the identification card, strip, or seal shall be removed by the district director and destroyed.

(j)(1) An approved identification card, strip, or seal may be removed from an employee by any Customs officer designated by the district director. In addition, the district director may revoke or suspend access to the Customs security area and demand that the identification strip or seal or Customs issued card be surrendered, for any of the following reasons:

(i) The approved identification card, strip, or seal was obtained through fraud or the misstatement of a material fact;

(ii) The employee is convicted of a felony, or convicted of a misdemeanor involving theft, smuggling, or any theft-connected crime;

(iii) The employee permits the approved identification card, strip or seal to be used by any other person, or refuses to openly display or produce it upon the proper demand of a Customs officer;

(iv) The continuation of privileges would, in the judgment of the district director, endanger the revenue or security of the area.

(v) The employee refuses or neglects to obey any proper order of a Customs officer, or any Customs order, rule, or regulation; or

(vi) The employee's duties no longer require that he have access to the Customs security area for an extended period of time at the airport of issuance. In this instance the employer shall notify the district director in writing, return the identification card, strip, or seal, and give information regarding the status of the employee who

was issued the card, strip, or seal and who no longer requires access. If the employee returns to duties in the Customs security area at the airport within 1 year, a Customs Form 3078, as required by paragraph (d) of this section, need not be submitted, at the discretion of the district director.

(2) The district director shall suspend or revoke access to the Customs security area by giving notice of the proposed action in writing to the employee with a copy of the notice to the employer. The notice shall be in the form of a statement specifically setting forth the grounds for revocation or suspension of the privilege and shall be final and conclusive upon the employee unless he files with the district director a written notice of appeal as provided in subparagraph (3) of this paragraph.

(3) The employee may file a written notice of appeal from the revocation or suspension within 10 calendar days following receipt of the notice of revocation or suspension. The notice of appeal shall be filed in duplicate, and shall set forth the response of the employee to the statement of the district director. The employee, in his notice of appeal, may request a hearing.

(4) If a hearing is requested, it shall be held before a hearing officer designated by the Commissioner or his designee within 30 calendar days following the request. The employee shall be notified of the time and place of the hearing at least 5 calendar days before the hearing.

(5) The employee may be represented by counsel at the revocation or suspension hearing. All evidence and testimony of witnesses in such proceeding, including substantiation of charges and the answer thereto, shall be presented. Both parties will have the right of cross-examination. A stenographic record of the proceedings shall be made upon request and a copy furnished to the employee. At the conclusion of the proceedings or review of a written appeal, the hearing officer or the district director, as the case may be, shall promptly transmit all papers and the stenographic record of the hearing to the Commissioner or his designee, together with his recommendation for final action.

(6) Following a hearing and within 10 calendar days after delivery of a copy of the stenographic record, the employee may submit to the Commissioner or his designee, additional written views and arguments on matters in the record.

(7) If neither the employee nor his attorney appear for a scheduled hearing, the hearing officer shall record that fact, accept any appropriate testimony, and conclude the hearing. The hearing officer shall promptly transmit all papers together with his recommendations to the Commissioner or his designee.

(8) After consideration of the recommendations of the hearing officer or the district director, the Commissioner or his designee shall render his decision, in writing, stating his reasons for the final ac-

tion. The decision shall be transmitted to the district director and served by him on the employee.

(k) When an approved identification card, strip, or seal is required under paragraph (b) of this section, and the district director determines that the application cannot be administratively processed in a reasonable period of time, an employer may, upon written request, be issued a temporary identification card, strip, or seal for his employee. The employer must satisfy the district director that a hardship to his business would result if the request is not granted.

(1) The temporary identification card, strip, or seal shall be valid for a period of 60 days. The district director may renew the temporary identification card, strip, or seal for additional 30-day periods if he determines that the circumstances under which the temporary identification card, strip, or seal was originally issued continue to exist. The temporary identification card, strip, or seal shall be destroyed by the district director when the permanent approved identification card, strip, or seal is issued, or the privileges granted thereby are withdrawn.

(2) The provisions of this paragraph shall also apply to temporary employees and official visitors requiring access to the Customs security area. In the case of temporary employees, the identification card, strip, or seal shall be valid for a period of 30 days. In the case of official visitors, the temporary identification card, strip, or seal shall be valid for the day of issuance only. Temporary employee and official visitor identification card, strips, or seals are renewable for periods equal to their original period of validity.

(3) The temporary identification card, strip, or seal may be revoked and access to the Customs security area denied at any time if the holder of the temporary identification card, strip, or seal refuses or neglects to obey any proper order of a Customs officer, or any Customs order, rule, or regulation, or if, in the judgment of the district director, continuation of the privileges granted thereby would endanger the revenue or pose a threat to the Customs security area.

Subpart C—Private Aircraft

§ 122.21 Application.

This subpart applies to all private aircraft as defined in § 122.1(h). No other provisions of this part apply to private aircraft, except where stated in this subpart.

§ 122.22 Notice of arrival.

When arriving in the U.S. from a foreign area, all private aircraft not covered by § 122.23 shall give advance notice of arrival as required in § 122.31.

§ 122.23 Private aircraft arriving from areas south of the U.S.

(a) *Definitions.* (1) For the purpose of this section, "private aircraft" means all aircraft except:

(i) public aircraft;

(ii) those aircraft operated on a regularly published schedule, pursuant to a certificate of public convenience and necessity or foreign aircraft permit issued by the Department of Transportation, authorizing interstate, overseas air transportation; and

(iii) those aircraft with a seating capacity of more than 30 passengers or a maximum payload capacity of more than 7,500 pounds which are engaged in air transportation for compensation of hire on demand. (See 49 U.S.C. App. 1372 and 14 CFR Part 298).

(2) The term "place" as used in this section means anywhere outside of the inner boundary of the Atlantic (Coastal) Air Defense Identification Zone (ADIZ) south of 30 degrees north latitude, anywhere outside of the inner boundary of the Gulf of Mexico (Coastal) ADIZ, or anywhere outside of the inner boundary of the Pacific (Coastal) ADIZ south of 33 degrees north latitude.

(b) *Advance report of penetration of U.S. airspace.* All private aircraft arriving in the Continental U.S. via the U.S./Mexican border or the Pacific Coast from a foreign place in the Western Hemisphere south of 33 degrees north latitude, or from the Gulf of Mexico and Atlantic Coasts from a place in the Western Hemisphere south of 30 degrees north latitude from any place in Mexico, from the U.S. Virgin Islands, or (notwithstanding the definition of "United States" in § 122.1(l)) from Puerto Rico, (which if from Puerto Rico, are conducting flight under visual flight rules (VFR)), shall furnish a notice of intended arrival to Customs at the nearest designated airport to point of crossing listed in § 122.24(b), for the first landing in the U.S. The notice must be furnished at least 1 hour before crossing the U.S. coastline or border. The notice may be furnished directly to Customs by telephone, radio, or other means, or may be furnished through the Federal Aviation Administration to Customs. The requirement to furnish a notice of intended arrival shall not apply to private aircraft departing from Puerto Rico and conducting flight under instrument flight rules (IFR) until crossing the U.S. coastline or proceeding north of 30 degrees north latitude.

(c) *Contents of notice.* The advance notice of arrival shall include the following:

(1) Aircraft registration number;

(2) Name of aircraft commander;

(3) Number of U.S. citizen passengers;

(4) Number of alien passengers;

(5) Place of last departure;

(6) Estimated time and location of crossing U.S. border/coastline;

(7) Estimated time of arrival;

(8) Name of intended U.S. airport of first landing, as listed in § 122.24, unless an exemption has been granted under § 122.25, or

the aircraft has not landed in foreign territory or is arriving directly from Puerto Rico, or the aircraft was inspected by Customs officers in the U.S. Virgin Islands.

§ 122.24 Landing requirements.

(a) *In general.* Private aircraft arriving in the U.S. from a foreign area shall follow the landing requirements set out in §§ 122.23 and 122.36.

(b) *Special requirements.* Private aircraft required to furnish a notice of intended arrival in compliance with § 122.23 shall land for Customs processing at the nearest designated airport to the border or coastline crossing point as listed in this paragraph unless exempted from this requirement in accordance with § 122.25. In addition to the requirements of this section, private aircraft commanders must comply with all other landing and notice of arrival requirements. This requirement shall not apply to private aircraft which have not landed in foreign territory or are arriving directly from Puerto Rico or if the aircraft was inspected by Customs officers in the U.S. Virgin Islands.

Location	Name
Beaumont, Tex.	Jefferson County Airport.
Brownsville, Tex.	Brownsville International Airport.
Calexico, Calif.	Calexico International Airport.
Corpus Christi, Tex.	Corpus Christi International Airport.
Del Rio, Tex.	Del Rio International Airport.
Douglas, Ariz.	Bisbee-Douglas International Airport.
Eagle Pass, Tex.	Eagle Pass Municipal Airport.
El Paso, Tex.	El Paso International Airport.
Fort Lauderdale, Fla.	Fort Lauderdale Executive Airport.
Fort Lauderdale, Fla.	Fort Lauderdale-Hollywood International Airport.
Fort Pierce, Fla.	St. Lucie County Airport.
Houston, Tex.	William P. Hobby Airport.
Key West, Fla.	Key West International Airport.
Laredo, Tex	Laredo International Airport.
McAllen, Tex.	Miller International Airport.
Miami, Fla.	Miami International Airport.
Miami, Fla.	Opa-Locka Airport.
New Orleans, La.	New Orleans International Airport (Moissant Field).
New Orleans, La.	New Orleans Lakefront Airport.
Nogales, Ariz.	Nogales International Airport.
Presidio, Tex.	Presidio-Lely International Airport.
San Diego, Calif.	Brown Field.
Tampa, Fla.	Tampa International Airport.
Tucson, Ariz.	Tucson International Airport.
West Palm Beach, Fla.	Palm Beach International Airport.
Yuma, Ariz.	Yuma International Airport.

§ 122.25 Exemption from special landing requirements.

(a) *Request.* Only companies principally headquartered in the U.S. or individuals principally residing in the U.S. that have operational control over U.S. registered aircraft required to give advance notice of arrival under § 122.23, may request an exemption from the special landing requirements in § 122.24. Exemptions are within the

discretion of the district director and may allow aircraft to land at any airport in the U.S. staffed by Customs. Aircraft traveling under an exemption shall continue to follow advance notice and general landing rights requirements.

(b) *Procedure.* An exemption request shall be made to the district director at the airport at which the majority of Customs overflight processing is desired by the applicant. The request shall be submitted:

(1) At least 30 days before the anticipated first arrival if the request is for an exemption covering a number of flights over a period of one year; or

(2) At least 15 days before the anticipated arrival if the request is for a single flight.

(a) *Content of request.* A request for exemption from the special landing requirements shall be signed by an officer of the company or by the requesting individual and be notarized or witnessed by a Customs officer, and shall include the following information:

(1) Aircraft U.S. registration number(s) and manufacturer's serial number(s) for all aircraft owned or operated by the applicant that will be utilizing the overflight exemption;

(2) Identification information for each aircraft including class, manufacturer, type, number, color scheme, and type of engine (e.g., turbojet, turbofan, turboprop, reciprocating, helicopter, etc.);

(3) A statement that the aircraft is equipped with a functioning mode C (altitude reporting) transponder which will be in use during overflight, that the overflights will be made in accord with instrument flight rules (IFR), and that the overflights will be made at altitudes above 12,500 feet mean sea level (unless otherwise instructed by Federal Aviation Administration controllers);

(4) Name and address of the applicant operating the aircraft, if the applicant is a business entity, the address of the headquarters of the business (include state of incorporation if applicable), and the names, addresses, Social Security numbers, and dates of birth of the company officer or individual signing the application. If the aircraft is operated under a lease, include the name, address, Social Security number, and date of birth of the owner if an individual, or the address of the headquarters of the business (include state of incorporation if applicable), and the names, addresses, Social Security numbers, and dates of birth of the officers of the business;

(5) Individual, signed applications from each usual or anticipated pilot or crewmember for all aircraft for which an overflight exemption is sought stating name, address, Social Security number, Federal Aviation Administration certificate number, and place and date of birth;

(6) A statement from the individual signing the application, as specified in paragraph (c)(4) of this section, that the pilot(s) and crewmember(s) responding to paragraph (c)(5) of this section are those intended to conduct overflights, and that to the best of the in-

dividual's knowledge, the information supplied in response to paragraph (c)(5) of this section is accurate;

(7) Names, addresses, Social Security numbers, and dates of birth for all usual or anticipated passengers. An approved passenger must be on board to utilize the overflight exemption. **Note: Where the Social Security number is requested, furnishing of the SSN is voluntary. The authority to collect the SSN is 19 U.S.C. 66, 1433, 1459, and 1624. The primary purpose for requesting the SSN is to assist in ascertaining the identity of the individual so as to assure that only law-abiding persons will be granted permission to land at interior airports in the U.S. without first landing at one of the airports designated in § 122.24. The SSN will be made available to Customs personnel on a need-to-know basis. Failure to provide the SSN may result in a delay in processing of the application.**

(8) Description of the usual or anticipated baggage or cargo if known, or the actual baggage or cargo;

(9) Description of the applicant's usual business activity;

(10) Name(s) of the airport(s) of intended first landing in the U.S. Actual overflights will only be permitted to specific approved airports.

(11) Foreign place or places from which flight(s) will usually originate; and

(12) Reasons for request for overflight exemption.

(d) *Procedure following exemption.* (1) If a private aircraft is granted an exemption from the landing requirement as provided in this section, the aircraft commander shall notify Customs at least 60 minutes before:

(i) Crossing into the U.S. over a point on the Pacific Coast north of 33 degrees north latitude; or

(ii) Crossing into the U.S. over a point of the Gulf of Mexico or Atlantic Coasts north of 30 degrees north latitude; or

(iii) Crossing into the U.S. over the Southwestern land border (defined as the U.S.-Mexican border between Brownsville, Texas, and San Diego, California). Southwestern land border crossings must be made while flying in Federal Aviation Administration published airways.

(2) The notice shall be given to a designated airport specified in § 122.24. The notice may be furnished directly to Customs by telephone, radio, or other means, or may be furnished through the Federal Aviation Administration to Customs. If notice is furnished pursuant to this paragraph, notice pursuant to §§ 122.23 and 122.24 is unnecessary.

(3) All overflights must be conducted pursuant to an instrument flight plan filed with the Federal Aviation Administration prior to the commencement of the overflight.

(4) The owner or aircraft commander of a private aircraft granted an exemption from the landing requirement must:

(i) Notify Customs of a change of Federal Aviation Administration registration number for the aircraft;

(ii) Notify Customs of the sale, theft, modification, or destruction of the aircraft;

(iii) Notify Customs of changes of usual or anticipated pilots or crewmembers as specified in paragraph (c)(5) of this section. Every pilot and crewmember participating in an overflight must have prior Customs approval either through initial application and approval, or through a supplemental application submitted by the new pilot or crewmember and approved by Customs before commencement of the pilot's or crewmember's first overflight.

(iv) Request permission from Customs to conduct an overflight to an airport not listed in the initial overflight application as specified in paragraph (c)(10) of this section. The request must be directed to the district director who approved the initial request for an overflight exemption.

(v) Retain copies of the initial request for an overflight exemption, all supplemental applications from pilots or crewmembers, and all requests for additional landing privileges, as well as a copy of the letter from Customs approving each of these requests. The copies must be carried on board any aircraft during the conduct of an overflight.

(vi) The notifications specified in this paragraph must be given to Customs within 5-working days of the change, sale, theft, modification, or destruction, or before a flight for which there is an exemption, whichever occurs earlier.

(e) *Inspection of aircraft having or requesting overflight exemption.* Applicants for overflight exemptions must agree to make the subject aircraft available for inspection by Customs to determine if the aircraft is capable of meeting Customs requirements for the proper conduct of overflight. Inspections may be conducted during the review of an initial application or at any time during the term of an overflight exemption.

§ 122.26 Entry and clearance.

Private aircraft, as defined in § 122.1(h), are not required to formally enter or to obtain formal clearance upon departure. However, entry and clearance requirements do apply to air charter and air taxi operators.

§ 122.27 Documents required.

(a) *Crewmembers and passengers.* Crewmembers and passengers on a private aircraft arriving in the U.S. shall make baggage declarations as set forth in Part 148 of this chapter. An oral declaration of articles acquired in foreign areas shall be made, unless a written declaration on Customs Form 6059–B is found necessary by inspecting officers.

(b) *Cargo.*

(1) On arrival, cargo and unaccompanied baggage not carried for hire aboard a private aircraft may be listed on a baggage declaration on Customs Form 6059–B, and shall be entered. If the cargo or unaccompanied baggage is not listed on a baggage declaration, it shall be entered in the same manner as cargo carried for hire into the U.S.

(2) On departure, when a private aircraft leaves the U.S. carrying cargo not for hire, the Bureau of Census (15 CFR Part 30) and the Export Administration (15 CFR Parts 368–399) regulations and any other applicable export laws shall be followed. A foreign landing certificate or certified copy of a foreign Customs entry is required as proof of exportation if the cargo includes:

(i) Merchandise valued at more than $500.00; or

(ii) More than one case of alcoholic beverages withdrawn from a Customs bonded warehouse or otherwise in bond for direct exportation by private aircraft.

A foreign landing certificate, when required, shall be produced within six months from the date of exportation and shall be signed by a revenue officer of the foreign country to which the merchandise is exported, unless it is shown that the country has no Customs administration, in which case the certificate may be signed by the consignee or by the vessel's agent at the place of landing.

§ 122.28 Private aircraft taken abroad by U.S. residents.

An aircraft belonging to a resident of the U.S. which is taken to a foreign area for non-commercial purposes and then returned to the U.S. by the resident shall be admitted under the conditions and procedures set forth in § 148.32 of this chapter. Repairs made abroad, and accessories purchased abroad shall be included in the baggage declaration as required by § 148.32(c), and may be subject to entry and payment of duty as provided in § 148.32.

§ 122.29 Overtime services.

(a) *Application.* Private aircraft arriving in the U.S. and requiring Customs services to be performed outside the regular hours of duty are subject to overtime charges. The overtime charges to be assessed against the operator of a private aircraft in connection with each arrival are limited to a maximum of $25.

(b) *Procedure.* An application must be made on Customs Form 3171 to receive overtime services. The application shall be supported by a bond on Customs Form 301, containing the bond conditions set forth in Subpart G of Part 113 of this chapter, or a cash deposit, and may be effective up to one year. See § 24.16(c) of this chapter.

§ 122.30 Other Customs laws and regulations.

Sections 122.2 and 122.161 apply to private aircraft.

SUBPART D—LANDING REQUIREMENTS

§ 122.31 Notice of arrival.

(a) *Application.* Except as provided in paragraph (b) of this section, all aircraft entering the U.S. from a foreign area shall give advance notice of arrival. When a private aircraft, as defined in § 122.23(a) of this part, enters the U.S. from a foreign area in the Western hemisphere south of the U.S., advance notice shall be given as provided in § 122.23. Aircraft arriving from Cuba shall follow the procedures set forth in Subpart O of this part.

(b) *Exceptions for scheduled aircraft of a scheduled airline.* Advance notice is not required for aircraft of a scheduled airline arriving under a regular schedule. The regular schedule shall have been filed with the district director for the district in which the first landing is made. Scheduled airlines shall also submit a copy of their schedules to the regional commissioner of the region in which the scheduled aircraft will land. This notice shall be given 30 days before the effective date of the schedule.

(c) *Giving notice of arrival.* (1) *Procedure.* The commander of an aircraft covered by this section shall give the advance notice of arrival. Notice shall be given to the district director at or nearest the place of first landing, either:

(i) directly by radio, telephone, or other method; or

(ii) through Federal Aviation Administration flight notification procedure (see International Flight Information Manual, Federal Aviation Administration).

(2) *Reliable facilities.* When reliable means for giving notice are not available (for example, when departure is from a remote place) a landing shall be made at a place where notice can be sent prior to coming into the U.S.

(d) *Contents of notice.* The advance notice of arrival shall include the following information:

(1) Type of aircraft and registration number;

(2) Name of aircraft commander;

(3) Place of last foreign departure;

(4) International airport of intended landing or other place at which landing has been authorized by Customs;

(5) Number of alien passengers;

(6) Number of citizen passengers; and

(7) Estimated time of arrival.

(e) *Time of notice.* Notice of arrival shall be furnished far enough in advance to allow inspecting officers to reach the place of first landing of the aircraft.

(f) *Notice to other Federal agencies.* When advance notice is received, the district director shall inform any other concerned Federal agency.

§ 122.32 Aircraft required to land.

Any aircraft coming into the U.S., including Puerto Rico, from an area outside the U.S., is required to land, unless exempted by the Federal Aviation Administration.

§ 122.33 Place of first landing.

The first landing of an aircraft entering the U.S. from a foreign area shall be at an international airport (see § 122.13, International airports). Permission to land at another place may be given under § 122.34 (Landing rights airport) or § 122.35 (Emergency or forced landing).

§ 122.34 Landing rights airport.

(a) *Permission to land.* Permission to land at a landing rights airport may be given as follows:

(1) *Scheduled flight.* The scheduled aircraft of a scheduled airline may be allowed to land at a landing rights airport. Permission is given by the regional commissioner, or his representative, of the region in which first landing is made.

(2) *Other aircraft.* All other aircraft may be allowed to land at a landing rights airport by the district director at the port of entry or station nearest the first place of landing.

(3) *Additional flights, charters or changes in schedule:*

(i) *Scheduled aircraft.* If a new carrier plans to set up a new flight schedule, or an established carrier makes changes in its approved schedule, landing rights may be granted by the regional commissioner.

(ii) *Additional or charter flight.* If a carrier or charter operator wants to begin operating or to add flights, application shall be made to the district director for landing rights. All requests shall be made not less than 48 hours before the intended time of arrival, except in emergencies. If the request is oral, it shall be put in writing before or at the time of arrival.

(4) *Emergency or forced landing.* Permission to land is not required for an emergency or forced landing (see § 122.35).

(b) *Notice to Federal agencies.* If an aircraft is given permission to land at a landing rights airport, the Customs officer who granted the landing rights shall notify the Public Health Service, the Immigration and Naturalization Service, the Animal and Plant Health Inspection Service, and any other interested Federal agency at once.

(c) *Payment of expenses.* The owner, operator or person in charge of the aircraft shall pay any added charges for inspecting the aircraft, passengers, employees and merchandise when landing rights are given. When permission to land is given to scheduled aircraft of a scheduled airline, no inspection charge is made except for the overtime expenses of Customs officers. (see § 24.16 of this chapter).

§ 122.35 Emergency or forced landing.

(a) *Application.* This section applies to emergency or forced landings made by aircraft when necessary for safety or the preservation of life or health, when such aircraft are:

(1) travelling from airport to airport in the U.S. under a permit to proceed (see §§ 122.52, 122.54 and 122.83(d)), or a Customs Form 7509 (see § 122.113); or

(2) coming into the U.S. from a foreign area.

(b) *Notice.* When an emergency or forced landing is made, notice shall be given:

(1) to the Customs officer at the intended place of first landing, nearest international airport, or nearest port of entry, as soon as possible;

(2) by the aircraft commander, other person in charge, or aircraft owner, who shall make a full report of the flight and the emergency or forced landing.

(c) *Passengers and crewmembers.* The aircraft commander or other person in charge shall keep all passengers and crewmembers in a separate place at the landing area until Customs officers arrive. Passengers and crewmembers may be removed if necessary for safety, or for the purpose of contacting Customs.

(d) *Merchandise and baggage.* The aircraft commander or other person in charge shall keep all merchandise and baggage together and unopened at the landing area until Customs officers arrive. The merchandise and baggage may be removed for safety or to protect property.

(e) *Mail.* Mail may be removed from the aircraft, but shall be delivered at once to an officer or employee of the Postal Service.

§ 122.36 Responsibility of aircraft commander.

If an aircraft lands in the U.S. and Customs officers have not arrived, the aircraft commander shall hold the aircraft, and any merchandise or baggage on the aircraft for inspection. Passengers and crewmembers shall be kept in a separate place until Customs officers authorize their departure.

§ 122.37 Precleared aircraft.

(a) *Application.* This section applies when aircraft carrying crew, passengers and baggage, or merchandise which has been precleared pursuant to § 148.22 of this chapter at a location listed in § 101.5 of this chapter and makes an unscheduled or unintended landing at an airport in the U.S.

(b) *Notice.* The aircraft commander or agent shall give written notice to the Customs office at:

(1) the intended place of unlading; and

(2) the place of preclearance.

(c) *Time of notice.* Notice shall be given within 7 days of the unscheduled or unintended landing unless other arrangements have been made in advance between the carrier and the district director.

§ 122.38 Permit and special license to unlade and lade.

(a) *Applicability.* Before any passengers, baggage, or merchandise may be unladen or laden aboard on arrival or departure of an aircraft subject to these regulations, a permit and/or special license to unlade or lade shall be obtained from Customs.

(1) *Permit to unlade or lade.* A permit is required to obtain Customs supervision of unlading and lading during official Customs duty hours.

(2) *Special license to unlade or lade.* A special license is required to obtain Customs supervision of unlading and lading at any time not within official Customs duty hours (generally, at night, Sundays or holidays).

(b) *Authorization required.* A permit or special license shall be required for each arrival and departure unless a term permit or special license has been granted. No permit or special license shall be issued unless the carrier complies with the terminal facilities and employee list requirements of § 4.30 of this chapter.

(c) *Term permit or special license.* A term permit or special license may be issued covering all arrivals and departures during a period of up to one year, providing local arrangements have been made to notify Customs before services are needed. The notice shall specify the kinds of services requested, and the exact times they will be needed. No term permit or special license shall be issued, and any term permit or special license already issued shall be revoked, unless the carrier complies with the terminal facilities and employee list requirements of § 4.30 of this chapter.

(d) *Procedures.* The application for a permit and special license to unlade or lade shall be made by the owner, operator, or agent for an aircraft on Customs Form 3171, and shall be submitted to the district director for the district in which the unlading and lading will take place. The application shall be accompanied by a bond on Customs Form 301, containing the bond conditions set forth in Subpart G of Part 113 of this chapter, or a cash deposit, unless this requirement is waived under paragraph (e) of this section.

(e) *Waiver of bond.* To insure prompt and orderly clearance of the aircraft, passengers, baggage, or merchandise, the district director may waive the requirement under paragraph (d) of this section that either a bond or a cash deposit be made, if he is convinced the revenue is protected and that all Customs requirements are satisfied.

(f) *Automatic renewal of term permit or special license.* Automatic renewal of a term permit or special license may be requested by the owner, operator, or agent for an aircraft when a bond on Customs Form 301 containing the appropriate bond conditions set forth in Subpart G of Part 113 of this chapter is on file. The request shall be

for successive annual periods which conform to the automatic renewal periods of the bond. An application will be approved by the district director unless specific reasons exist for denial. If a request for automatic renewal is not approved, the district director shall notify the requestor, and shall state the reasons for the denial. To apply for automatic renewal, item 10 on Customs Form 3171 shall be changed by adding the following words after the period of time indicated:

"And automatic annual renewal thereof for so long as the bond is renewed and remains in effect."

SUBPART E—AIRCRAFT ENTRY AND ENTRY DOCUMENTS

§ 122.41 Aircraft required to enter.

All aircraft coming into the U.S. from a foreign area shall make entry under Subpart E except:

(a) Public and private aircraft; and

(b) Aircraft traveling from airport to airport in the U.S. under Subpart I, relating to residue cargo procedures.

§ 122.42 Aircraft entry.

(a) *By whom.* Entry shall be made by the aircraft commander or an agent.

(b) *Place of entry.* (1) *First landing at international airport.* Entry shall be made at the international airport at which first landing is made.

(2) *First landing at another airport.* If the first landing is not at an international airport pursuant to §§ 122.34 or 122.35, the aircraft commander or agent shall make entry at the nearest international airport or port of entry, unless some other place is allowed for the purpose.

(c) *Delivery of forms.* When the aircraft arrives, the aircraft commander or agent shall deliver any required forms to the Customs officer at the place of entry at once.

(d) *Exception to entry requirement.* Except for flights to Cuba (provided for in Subpart O of this Part), an aircraft of a scheduled airline which stops only for refueling at the first place of arrival in the U.S. shall not be required to enter provided:

(1) That such aircraft departs within 24 hours after arrival;

(2) No cargo, crew, or passengers are off-loaded; and

(3) Landing rights at that airport as either a regular or alternate landing place shall have been previously secured.

§ 122.43 General declaration.

(a) *When required.* A general declaration, Customs Form 7507, shall be filed for all aircraft required to enter under § 122.41 (Aircraft required to enter).

(b) *Exception.* Aircraft arriving directly from Canada on a flight beginning in Canada and ending in the U.S. need not file a general

declaration to enter. Instead, an air cargo manifest (see § 122.48) may be filed in place of the general declaration, regardless of whether cargo is on board. The air cargo manifest shall state the following:

> I certify to the best of my knowledge and belief that this manifest contains an exact and true account of all cargo on board this aircraft.
>
> Signature_____
> (Aircraft Commander or Agent)

(c) *Form.* The general declaration shall be on Customs Form 7507 or on a privately printed form prepared under § 122.5. The form shall contain all required information, unless the information is given in some other manner under Subpart E of this part.

§ 122.44 Crew baggage declaration.

If an aircraft enters the U.S. from a foreign area, aircraft crewmembers shall file a crew baggage declaration as provided in Subpart G, Part 148 of this chapter.

§ 122.45 Crew list.

(a) *When required.* A crew list shall be filed by all aircraft required to enter under § 122.41.

(b) *Exception.* No crew list is required for aircraft arriving directly from Canada on a flight beginning in Canada and ending in the U.S. Instead, the total number of crewmembers may be shown on the general declaration.

(c) *Form.* The crew list shall show the full name (last name, first name, middle initial) of each crewmember, either:

(1) On the general declaration in the column headed "Total Number of Crew"; or

(2) On a separate, clearly marked document.

(d) *Crewmembers returning as passengers.* Crewmembers of any aircraft returning to the U.S. as passengers on a commercial aircraft from a trip on which they were employed as crewmembers shall be listed on the aircraft general declaration or crew list.

§ 122.46 Crew purchase list.

(a) *When required.* A crew purchase list shall be filed with the general declaration for any aircraft required to enter under § 122.41.

(b) *Exception.* A crew purchase list is not required for aircraft arriving directly from Canada on a flight beginning in Canada and ending in the U.S. If a written crew declaration is required for the aircraft under Subpart G of Part 148 of this chapter (Crewmember Declarations and Exemptions), it shall be attached to the air cargo manifest, along with the number of any written crew declarations.

(c) *Form.* If a crewmember enters articles for which a written crew declaration is not required (see Subpart G, Part 148 of this

chapter), the articles shall be listed next to the crewmember's name on the general declaration, or on the attached crew purchase list. Articles listed on a written crew declaration need not be listed on the crew purchase list if:

(1) the crew declaration is attached to the general declaration, or to the crew list which in turn is attached to the general declaration; and

(2) the statement "Crew purchases as per attached crew declaration" appears on the general declaration or crew list.

§ 122.47 Stores list.

(a) *When required.* A stores list shall be filed for all aircraft required to enter under § 122.41.

(b) *Form.* The aircraft stores shall be listed on the cargo manifest or on a separate list. If the stores are listed on a separate list, the list must be attached to the cargo manifest. The statement "Stores List Attached" must appear on the cargo manifest.

(c) *Contents.* (1) *Required listing.* The stores list shall include all of the following:

(i) Alcoholic beverages, cigars, cigarettes and narcotic drugs, whether domestic or foreign;

(ii) bonded merchandise arriving as stores;

(iii) foreign merchandise arriving as stores; and

(iv) equipment which must be licensed by the Secretary of State (see § 122.48(b)).

(2) *Other articles.* In the case of aircraft of scheduled airlines, other domestic supplies and equipment (if not subject to license) and fuel may be dropped from the stores list if the statement "Domestic supplies and equipment and fuel for immediate flight only, except as noted" appears on the cargo manifest or on the separate stores list. The stores list shall be attached to the cargo manifest.

(d) *Other statutes.* Section 446, Tariff Act of 1930, as amended (19 U.S.C. 1446), which covers supplies and stores kept on board vessels, applies to aircraft arriving in the U.S. from any foreign area.

§ 122.48 Air cargo manifest.

(a) *When required.* An air cargo manifest for all cargo on board shall be filed together with the general declaration for any aircraft required to enter under § 122.41.

(b) *Exception.* A cargo manifest is not required for merchandise, baggage and stores arriving from and departing for a foreign country on the same through flight. Any cargo manifest already on board may be inspected. All articles on board which must be licensed by the Secretary of State shall be listed on the cargo manifest. Company mail shall be listed on the cargo manifest.

(c) *Form.* The cargo manifest shall be on Customs Form 7509. The form shall contain all required information, except that a more complete description of the cargo shipped under air waybills may be

provided by attaching a copy of each master air waybill and, if a consolidated shipment, copies of the house air waybills to the cargo manifest. The statement "Cargo as per air waybills attached" shall appear on the cargo manifest when this is done. Each air waybill number shall also be listed on the cargo manifest.

(d) *Unaccompanied baggage.* Unaccompanied baggage arriving in the U.S. under a check number from any foreign country by air and presented timely to Customs may be authorized for delivery by the carrier after inspection and examination without preparation of an entry, declaration, or being manifested as cargo. Such baggage must be found to be free of duty or tax under any provision of Schedule 8, Tariff Schedules of the United States (19 U.S.C. 1202), and cannot be restricted or prohibited. Unaccompanied checked baggage not presented timely to Customs or presented timely and found by Customs to be dutiable, restricted, or prohibited may be subject to seizure. Such unaccompanied checked baggage shall be added to the cargo list in columns under the following headings:

Check No.	Description	Where from	Destination	Name of examining officer	Disposition

The two columns, headed "Name of examining officer" and "Disposition," are provided on the cargo manifest for the use of Customs officers. Unaccompanied unchecked baggage arriving as air express or freight shall be manifested as other air express or freight.

(e) *Accompanied baggage in transit.* This section applies when accompanied baggage enters into the U.S. in one aircraft and leaves the U.S. in another aircraft. When passengers do not have access to their baggage while in transit through the U.S., the baggage is considered cargo and shall be listed on Customs Form 7509, Air Cargo Manifest.

§ 122.49 Correction of air cargo manifest or air waybill.

(a) *Shortages.* (1) *Reporting.* Shortages (merchandise listed on the manifest or air waybill but not found) shall be reported to the district director by the aircraft commander or agent. The report shall be made:

(i) On a Customs Form 5931, filled out and signed by the importer and the importing or bonded carrier; or

(ii) On a Customs Form 5931, filled out and signed by the importer alone under § 158.3 of this chapter; or

(iii) On a copy of the cargo manifest, which shall be marked "Shortage Declaration," and must list the merchandise involved and the reasons for the shortage.

(2) *Time to file.* Shortages shall be reported within the time set out in Part 158 of this chapter, or within 30 days of aircraft entry.

(3) *Evidence.* The aircraft commander or agent shall supply proof of the claim that:

(i) shortage merchandise was not imported, or was properly disposed of; or

(ii) that corrective action was taken. This proof shall be kept in the carrier file for one year from the date of aircraft entry.

(b) *Overages.* (1) *Reporting.* Overages (merchandise found but not listed on the manifest or air waybill) shall be reported to the district director by the aircraft commander or agent. The report shall be made:

(i) on a Customs Form 5931; or

(ii) on a separate copy of the cargo manifest which is marked "Post Entry" and lists the overage merchandise and the reason for the overage.

(2) *Time to file.* Overages shall be reported within 30 days of aircraft entry.

(3) *Evidence.* Satisfactory proof of the reasons for the overage shall be kept on file by the carrier for one year from the date of the report.

(c) *Statement on cargo manifest.* If the air cargo manifest is used to report shortages or overages, the Shortages Declaration or Post Entry must include the signed statement of the aircraft commander or agent as follows:

> I declare to the best of my knowledge and belief that the discrepancy described herein occurred for the reason stated. I also certify that evidence to support the explanation of the discrepancy will be retained in the carrier's files for a period of at least one year and will be made available to Customs on demand.
>
> Signature_____
>
> (Aircraft Commander or Agent)

(d) *Notice by district director.* The district director shall immediately notify the aircraft commander or agent of any shortages or overages that were not reported by the aircraft commander or agent. Notice shall be given by sending a copy of Customs Form 5931 to the aircraft commander or agent, or in any other appropriate way. The aircraft commander or agent shall make a satisfactory reply within 30 days of entry of the aircraft or receipt of the notice, whichever is later.

(e) *Correction not required.* A correction in the manifest or air waybill or not required if:

(1) The district director is satisfied that the difference between the quantity of bulk merchandise listed on the manifest or air waybill, and the quantity unladen, is the usual difference caused by ab-

sorption or loss of moisture, temperature, faulty weighing at the airport, or other such reason; and

(2) the marks or numbers on merchandise packages are different from the marks or numbers listed on the cargo manifest for those packages if the quantity and description of the merchandise is given correctly.

(f) *Statutes applicable.* If an aircraft arrives in the U.S. from a foreign area with merchandise and unaccompanied baggage for which a manifest or air waybill must be filed, §§ 440 (concerning post entry) and 584 (concerning manifest violations), Tariff Act of 1930, as amended (19 U.S.C. 1440, 1584), apply.

Subpart F—International Traffic Permit

§ 122.51 Aircraft of domestic origin registered in the U.S.

After Customs inspection of other aircraft, passengers, baggage and merchandise at the entry airport, commercial aircraft of domestic origin registered in the U.S. may be allowed to proceed to other airports in the U.S. without permit.

§ 122.52 Aircraft of foreign origin registered in the U.S.

(a) *Application.* This section applies to commercial aircraft (as defined in § 122.1(d)) of foreign origin registered in the U.S. and arriving in the U.S. from a foreign area.

(b) *Aircraft entered as an imported article.* If an aircraft covered by this section is entered as an imported article, and any applicable duty for the aircraft has been paid on a prior arrival, it may be allowed to proceed as other than an imported article. In this instance, the aircraft commander must file a declaration that states the:

(1) port where entry was made;

(2) date duty, if any, was paid; and

(3) number of the entry.

(c) *Aircraft not entered as imported article.* (1) *Treatment as other than an imported article.* A commercial aircraft covered by this section which has not been entered as an imported article may travel from airport to airport in the U.S. without payment of duty. Each commercial aircraft shall proceed under a permit on Customs Form 7507 or 7509, as provided in § 122.54. Treatment of the aircraft as other than an imported article shall continue for so long as the aircraft:

(i) is used only for commercial purposes between the U.S. and foreign areas; and

(ii) will leave the U.S. for a foreign destination in commercial use or carrying neither passengers nor cargo.

(2) *Treatment as an imported article.* Any aircraft covered by this section which was not entered as an imported article shall make entry if it: (i) is withdrawn from commercial use between the U.S. and foreign areas; or

(ii) is used in the U.S. in a way not reasonably related to efficient commercial use of the aircraft between the U.S. and foreign areas.

(3) *Aircraft damage and duty payment.*

(i) *Substantial damage to commercial aircraft.* If an accident causes substantial damage to a commercial aircraft, no entry or duty payment is required for any part of the wreckage.

(ii) *Less than substantial damage and export.* If an accident does not cause substantial damage to a commercial aircraft, salvageable parts of the wrecked aircraft may be exported. In this circumstance, the aircraft, as a whole or in part, is not considered to be withdrawn from commercial use and is not subject to entry or to duty as imported merchandise.

(iii) *Less than substantial damage and no export.* If an accident does not cause substantial damage to a commercial aircraft and the wrecked aircraft or any salvageable part of it is not exported, then:

(A) entry is required to be made for the damaged aircraft or any salvageable part of it; and

(B) a duty payment, if applicable, based on the condition of the aircraft following the accident, is required.

§ 122.53 Aircraft of foreign registry chartered or leased to U.S. air carriers.

Aircraft of foreign registry leased or chartered to a U.S. air carrier, while being operated by the U.S. air carrier under the provisions of the Federal Aviation Administration regulations (14 CFR 121.153), shall be treated as U.S. registered aircraft for purposes of this subpart.

§ 122.54 Aircraft of foreign registry.

(a) *Application.* For any commercial aircraft of foreign registry arriving in the U.S., the aircraft commander or agent shall file for an international traffic permit when the aircraft:

(1) is not an imported article; and

(2) is ferried (proceeds carrying neither passengers nor cargo) from the airport of first arrival to one or more airports in the U.S. (For permit to proceed with residue cargo, passengers, or crewmembers for discharge in the U.S., see Subpart I of this part).

(b) *International traffic permit.* The international traffic permit shall be filed on Customs Form 7507 by the carrier or its agent. Customs Form 7509 may be used if the aircraft arrives directly from Canada on a flight beginning in Canada and ending in the U.S. Either form shall show the following information and must be approved by the appropriate Customs officer:

(1) Type of aircraft;

(2) Nationality and registration number of aircraft;

(3) Name and country of aircraft manufacturer;

(4) Name of aircraft commander;

(5) Country from which aircraft arrived;

(6) Name and location of airport where international traffic permit is issued;
(7) Date international traffic permit is issued;
(8) Name and location of airport to which aircraft is proceeding;
(9) Purpose of stay in the U.S.;
(10) Signature of Customs officer giving permit.

(c) *Permit on board.* The international traffic permit shall be kept on board the aircraft while in the U.S.

(d) *Intermediate airports.* For each airport at which the aircraft lands, the Customs officer, or airport manager if there is no Customs officer present, shall note the following information on the permit:
(1) Name and location of airport;
(2) Date and arrival time;
(3) Purpose of the visit;
(4) Name and location of the next airport to be visited; and
(5) Date and time of departure.

(e) *Final airport.* The international traffic permit shall be given to the Customs officer in charge at the airport of final clearance for a foreign destination. Before clearance is given, the Customs officer shall make sure that the aircraft was properly inspected by Customs of the U.S.

(f) *Port of issue.* The international traffic permit shall be returned after final clearance to the district director at the port where the permit was issued, to be kept on file.

(g) *Enforcement.* Once the permit to proceed has been issued for an aircraft, the district director at the port of issue must receive notice that the aircraft has made final clearance. If notice is not received within 60 days, the district director shall report the matter to the Customs agent in charge of the area for investigation.

Subpart G—Clearance of Aircraft and Permission To Depart

§ 122.61 Aircraft required to clear.

All aircraft, except public and private aircraft, leaving the U.S. for a foreign area are required to clear if:
(1) carrying passengers and/or merchandise for hire; or
(2) taking aboard or discharging passengers and/or merchandise for hire in a foreign area.

This includes any aircraft used by members of air travel clubs. Foreign aircraft traveling under a permit to proceed shall also clear.

§ 122.62 Aircraft not otherwise required to clear.

(a) *Bureau of the Census.* Under Bureau of the Census Regulations (15 CFR Part 30.1), aircraft not required to clear by § 122.61 shall obtain permission to depart if carrying merchandise from the U.S. to Puerto Rico or from Puerto Rico to the U.S.

(b) *Office of Export Administration.* Aircraft leaving the U.S. for a foreign area must be cleared by Customs if a validated license from the Office of Export Administration (Department of Commerce) is required for the aircraft under the Export Control Regulations (15 CFR Part 370). Aircraft are not required to clear if the Secretary of Commerce issues a permit allowing departure without clearance.

(c) *Department of State.* Aircraft not covered by Export Control Regulations are subject to the Department of State export licensing authority as set out in 22 CFR Parts 121,123. Such aircraft may depart from the U.S. only with the proper Department of State license.

§ 122.63 Scheduled airlines.

The aircraft commander or agent shall request clearance or permission to depart for aircraft of scheduled airlines covered by this subpart.

(a) *Clearance at other than airport of final departure.* Aircraft may clear at each airport where merchandise and/or passengers are taken on board for transport outside of the U.S. The clearance applies only to the merchandise and passengers boarding at each place. Clearance shall be requested at the Customs port of entry (regardless of whether it is an international airport) nearest to the place where merchandise and/or passengers are taken on board.

(b) *Clearance at final departure airport.* Clearance or permission to depart may be requested at the Customs port of entry (regardless of whether it is an international airport) nearest the last departure airport, unless some other place is designated by the district director at that port.

§ 122.64 Other aircraft.

Clearance or permission to depart shall be requested by the aircraft commander or agent for aircraft covered by this subpart other than those of scheduled airlines. The request must be made to the district director at the Customs port of entry (regardless of whether it is an international airport) nearest the final departure airport, unless some other place is designated by the district director.

§ 122.65 Failure to depart.

Once an aircraft has been cleared or given permission to depart it must depart within 72 hours. The aircraft commander or agent shall report promptly to the district director if departure is delayed beyond or cancelled within 72 hours after the aircraft received clearance or permission to depart.

SUBPART H—DOCUMENTS REQUIRED FOR CLEARANCE AND PERMISSION TO DEPART

§ 122.71 Aircraft departing with no commercial export cargo.

(a) *Application.* This section applies to aircraft departing for foreign territory with no export cargo, but not to those aircraft which are themselves being exported.

(1) Such aircraft may clear by telephone in advance with the district director nearest the departure place if departing empty or carrying only:

(i) passengers for hire; or

(ii) non-commercial cargo for which Shipper's Export Declarations are not required.

(2) If not cleared by telephone, an air cargo manifest containing the following statement, signed by the aircraft commander or agent, shall be submitted to Customs:

> I declare to the best of my knowledge and belief that there is no cargo on board this aircraft.
>
> Signature_____
> (Aircraft Commander or Agent)

(b) *Timeliness.* The request for telephone clearance must be received by the Customs officer in charge with sufficient time remaining before departure to ensure that Customs may undertake any necessary examination of the aircraft and cargo.

(c) *Documentation.* If clearance is granted by telephone, the aircraft commander is not required to file the documents required by this subpart.

§ 122.72 Aircraft departing with commercial export cargo.

If an aircraft with export cargo leaves the U.S. for any foreign area, a general declaration, if required, an air cargo manifest and any required Shipper's Export Declarations, shall be filed in accordance with this subpart for all cargo on the aircraft, and for the aircraft itself if exported as merchandise. See § 122.79 for special requirements regarding shipments to U.S. possessions.

§ 122.73 General declaration and air cargo manifest.

(a) *General declaration.*

(1) *Form.* The general declaration shall be on Customs Form 7507 and shall show all information required.

(2) *Preparation and filing.* The aircraft commander or agent shall file two copies of the general declaration with the district director at the departure airport.

(3) *Exception.* A general declaration shall not be required if the air cargo manifest, Customs Form 7509, contains the statement shown in paragraph (b) of this section.

(b) *Air cargo manifest.*

(1) *Form.* The air cargo manifest shall be on Customs Form 7509, and shall show all information required. If a general declaration is not presented, the following statement, signed by the aircraft commander or agent, shall appear on the form:

> I declare that all statements contained in this manifest, including the account of the cargo on board this aircraft, are complete, exact, and true to the best of my knowledge.
>
> Signature_____
> (Aircraft Commander or Agent)

(2) *Preparation and filing.* The aircraft commander or agent shall file two copies of the air cargo manifest with the district director of the departure airport. Three copies of the air cargo manifest shall be filed if the aircraft is covered by § 122.77(b). The air cargo manifest must be filed in:

(i) Complete form, with all required Shipper's Export Declarations (see § 122.75); or

(ii) Incomplete form (pro forma) under § 122.74.

§ 122.74 Incomplete (pro forma) manifest.

(a) *Application.* Clearance or permission to depart may be given to an aircraft by the district director before a complete manifest or all required Shipper's Export Declarations have been filed, if a proper bond is filed on Customs Form 301, containing the bond conditions set forth in Subpart G of Part 113 of this chapter, except for aircraft bound for locations referred to in paragraph (b) of this section.

(b) *Exceptions.* An incomplete manifest will not be accepted:

(1) during any time covered by a proclamation of the President that a state of war exists between foreign nations; or

(2) if the aircraft is departing on a flight from the U.S. directly or indirectly to a foreign country listed in § 4.75 of this chapter.

In both cases, a complete air cargo manifest and all required Shipper's Export Declarations shall be filed with the district director before the aircraft will be cleared.

(c) *Filing under bond.* An incomplete set of documents may be filed only when accompanied by the proper bond. Under the bond, a complete set of documents shall be filed within whichever of the following time periods is appropriate.

(1) *Shipments to foreign countries.* All required Shipper's Export Declarations and a complete air cargo manifest shall be filed by the airline not later than the fourth business day after clearance (when clearance is required) or departure (when clearance is not required) of the aircraft.

(2) *Shipments to and from Puerto Rico.* For shipments between the U.S. and Puerto Rico, the complete manifest (when required)

and all Shipper's Export Declarations shall be filed by the airline not later than the seventh business day after departure.

(3) *Shipments to U.S. possessions.* For shipments between the U.S. or Puerto Rico and possessions of the U.S., a complete manifest and all required Shipper's Export Declarations shall be filed by the airline not later than the seventh business day after departure. See § 122.79.

(d) *Declaration required.* A declaration shall be made on the incomplete manifest that:

(1) All required documents will be filed within the 4-day bond period; or

(2) All required documents will be filed within the 7-day bond period.

Once all documents have been filed, a statement as required by § 122.75(b) shall be made.

§ 122.75 Complete manifest.

(a) *Contents.* A complete air cargo manifest shall list all cargo laden, and show for each item the air waybill number, or marks and numbers on packages and the type of goods carried. If an item does not require a Shipper's Export Declaration, it shall be noted on the air cargo manifest.

(1) *Shipments on an air waybill.* A copy of each air waybill on which shipments are listed may be attached to the air cargo manifest, and the number of the air waybill may be listed on the air cargo manifest. The statement "Cargo as per Air Waybill Attached" must appear on the air cargo manifest if this is done.

(2) *Direct departure.* This subsection applies only to direct departures of shipments requiring a Shipper's Export Declaration. A copy of each declaration may be attached to the air cargo manifest, and the number of each declaration shall be listed on the air cargo manifest in the column for air waybill numbers. The statement "Cargo as per export Declarations Attached" must appear on the manifest if this is done.

(b) *Statement required.*

(1) When all required documents are ready for filing, the following statement must appear on the air cargo manifest, or on the general declaration form if an air cargo manifest is not required:

> "Attached Shipper's Export Declarations represent a full and complete enumeration and description of the cargo carried in this flight except that listed on the cargo manifest."

(2) If an incomplete set of documents has been filed and is later completed, the following statement shall accompany the Shipper's Export Declarations and any required air cargo manifests:

"Attached Shipper's Export Declarations represent a full and complete enumeration and description of the cargo carried on aircraft No. _____, Flight No. _____ cleared direct for _____, on _____ except cargo listed on any cargo manifest required to be filed for such flight."

Airline_____

Authorized Agent_____

§ 122.76 Shipper's Export Declarations and inspection certificates.

At the time of clearance, the aircraft commander or agent shall file with the district director at the departure airport any Shipper's Export Declarations required by the Bureau of Census (see § 122.62(a)). The aircraft commander or authorized agent also shall deliver a proper export inspection certificate issued by the Veterinary Service, Animal and Plant Inspection Service, Department of Agriculture (9 CFR Part 91), to the Customs officer in charge at the time of departure of any aircraft carrying horses, mules, asses, cattle, sheep, swine or goats.

§ 122.77 Clearance certificate.

(a) *Aircraft departing from the U.S.* One copy of the air cargo manifest shall be used as a clearance certificate when endorsed by the district director to show that clearance is granted.

(b) *Scheduled aircraft.* If a scheduled aircraft clears at an airport which is not the airport at or nearest the place of final take-off from the U.S., two copies of the air cargo manifest shall be filed. One copy shall be used as a clearance certificate when endorsed at the port by the district director at the port where clearance is obtained, and the second copy shall be attached to the first for use at subsequent U.S. ports.

§ 122.78 Entry or withdrawal for exportation or for transportation and exportation.

If a shipment is exported under an entry or withdrawal for exportation, or for transportation and exportation, the air cargo manifest, the air waybill, or the consignment note attached to the manifest shall clearly show the following information for each entry or withdrawal:

(a) Number;
(b) Date; and
(c) Class of entry or withdrawal, as follows:
(1) transportation and exportation;
(2) withdrawal for transportation and exportation;
(3) immediate exportation;
(4) withdrawal for exportation; or
(5) withdrawal for transportation.

The name of the port where the entry or withdrawal was filed, if not the port where the merchandise is laden for exportation, shall also appear on the air cargo manifest.

§ 122.79 Shipments to U.S. possessions.

(a) *Other than Puerto Rico.* An air cargo manifest shall be filed for aircraft transporting cargo between the U.S. and U.S. possessions. Shipper's Export Declarations are not required for shipments from the U.S. or Puerto Rico to the U.S. possessions, except to the U.S. Virgin Islands or from a U.S. possession and destined to the U.S., Puerto Rico, or another U.S. possession.

(b) *Puerto Rico.* This subsection applies when an aircraft carries merchandise on a direct flight between the U.S. and Puerto Rico. If the requirements contained in Subpart I, relating to residue cargo procedures, have been satisfied, an air cargo manifest is required only for:

(1) merchandise transported as cargo for which a Shipper's Export Declaration is not required; or

(2) cargo for which a Shipper's Export Declaration cannot be filed on time. (See 15 CFR 30.21).

Any required air cargo manifest or Shipper's Export Declarations shall be filed with the district director at the point of departure.

§ 122.80 Verification of statement.

Customs officers may verify any of the statements required under this subpart by examining the shipping records of the airline involved.

Subpart I—Procedures for Residue Cargo and Stopover Passengers

§ 122.81 Application.

(a) *Aircraft arriving with cargo.* Aircraft arriving in the U.S. from a foreign area with cargo shown on the manifest to be traveling to other airports in the U.S. or to foreign areas may proceed under the provisions of this subpart.

(b) *Aircraft arriving with no cargo.* Aircraft arriving in the U.S. from a foreign area with no cargo on board, and requesting immediate examination and release, may proceed if a bond on Customs Form 301, containing the bond conditions set forth in Subpart G of Part 113 of this chapter, has been filed and covers the aircraft.

§ 122.82 Bond requirements.

A bond on Customs Form 301, containing the bond provisions set forth in Subpart G of Part 113 of this chapter, shall be filed before an aircraft is given a permit to proceed with residue cargo under this subpart. The bond shall be filed in the correct amount with the district director at the entry airport.

§ 122.83 Forms required.

(a) *Traveling general declaration and manifest.* When applying for examination and release from an airport or place of entry in the U.S., the aircraft commander or agent shall file a traveling general declaration and manifest. The traveling general declaration and manifest is one certified copy of the original inward general declaration, and each air cargo manifest required when the aircraft entered. This includes air waybills that were part of the manifest.

(b) *Attachments to traveling general declaration and manifest.*

(1) *Crew purchase and stores list.* The crew purchase and stores list, if required when the aircraft enters under §§ 122.46 and 122.47, shall be attached to the traveling general declaration and manifest.

(2) *Crew purchases not listed on a crew purchase list.* A crew member's declaration shall be attached to the traveling general declaration and manifest if:

(i) crew purchases are listed on a crew declaration, Customs Form 5129, instead of on the crew purchase list, under § 122.46(c)(2); and

(ii) the crew member has not left the aircraft with his or her purchases at the first entry port.

The crew member's declaration must be attached at the port where the articles listed on the declaration receive clearance.

(c) *Abstract general declaration and manifest.* The abstract general declaration and manifest shall consist of one copy of the general declaration, and one copy of each manifest (including air waybills) covering residue cargo:

(1) not yet examined and released by Customs or any other Federal agency; and

(2) to be discharged at another domestic or foreign airport.

An abstract general declaration and manifest need not be filed at the last domestic port of discharge.

(d) *Permit to proceed.* A permit to proceed from one domestic airport to another shall be filed by the aircraft commander or agent with the Customs officer in charge at the clearance airport. The permit to proceed shall include a declaration by the aircraft commander or agent, which shall be signed on entry at the next domestic airport. The permit to proceed and declaration shall state substantially the following:

PERMIT TO PROCEED FROM ONE AIRPORT TO ANOTHER

Airport of Departure_____

Date_____

Permission is hereby given aircraft _____

_____ to proceed to _____

(next domestic airport)

The aircraft which has arrived from and is destined to the places shown in the general declaration, is proceeding to such places of destination to discharge residue cargo, passengers, or crew members and their purchases, as listed in the attached manifest. Bond was given at the airport of arrival for the cargo retained on board. Items of cargo manifested for delivery at this airport appear to have been landed.

Number of crew members not cleared by Customs_____

Number of passengers not cleared by Customs_____

Number of pages of the traveling manifest_____

_____

(Customs Officer and Title)

_____

DECLARATION ON ENTRY OF AIRCRAFT AT FOLLOWING AIRPORT

Airport of Arrival_____

Date_____

I, _____, commander or authorized agent of the aircraft identified in this document, declare and guarantee that there were not, when such aircraft departed from the airport of _____, nor have been since, nor now are, any more or other goods, wares, or merchandise on board than was started in the attached manifests.

_____

(Signature and Title)

_____

The permit to proceed and declaration must be stamped, mimeographed or printed on:

(1) the abstract general declaration;

(2) the traveling general declaration when an abstract general declaration is not required; or

(3) a separate piece of paper.

(e) *Permit to proceed for nonscheduled aircraft.* For each permit to proceed issued to a nonscheduled aircraft carrying residue cargo the transit air cargo manifest procedures shall be followed and a numbered Customs Form 7512–C shall be filled out and filed. The number on the form shall be placed in the upper right hand corner of the permit to proceed. The original copy of Customs Form 7512–C shall be forwarded as required by the issuing port and the duplicate must be attached to the permit and given to the aircraft commander. When the aircraft arrives at the final port, the aircraft com-

mander shall deliver the permit to proceed and Customs Form 7512–C (duplicate) to Customs.

(f) *Use of form.* When all of the documents required by this section are in order, the permit to proceed shall be dated and signed by the Customs officer in charge at the clearance airport. One copy of the permit to proceed shall be delivered to the aircraft commander or agent with the other required documents, for filing at the next international airport.

§ 122.84 Intermediate airport.

(a) *Application.* The provisions of this section apply at any U.S. airport to which an aircraft proceeds with residue cargo, and passengers, or crewmembers and their purchases not cleared by Customs. they do not apply to aircraft arriving at the last domestic port of discharge.

(b) *Entry.* When an aircraft arrives at the next airport, the aircraft commander or agent shall make entry by filing the:

(1) abstract general declaration and manifest;
(2) traveling general declaration and manifest; and
(3) permit to proceed.

The DECLARATION OF ENTRY OF AIRCRAFT AT FOLLOWING AIRPORT, found on the permit to proceed, shall be properly signed before filing for entry.

(c) *Crew declarations.* The declarations and entries, Customs Form 5129, of any crewmembers who leave the aircraft with their purchases at the intermediate airport shall be detached from the traveling general manifest. The declaration and entries are to be detached by the Customs officer in charge and are kept at the airport.

(d) *Departure.* When the aircraft leaves an intermediate airport carrying residue cargo, and passengers or crewmembers and their purchases are not yet cleared by Customs or another interested Federal agency, the procedure is the same as at the first arrival airport. All documents required by this section, except those detached under paragraph (c) of this section, shall be returned to the aircraft commander or agent for filing at the next entry airport.

§ 122.85 Final airport.

When an aircraft enters at the last domestic airport of discharge, the traveling general declaration and manifest shall be filed with Customs and kept at the airport. No abstract general declaration and manifest is required.

§ 122.86 Substitution of aircraft.

(a) *Application.* The residue cargo procedure applies when an airline must substitute aircraft to reach a destination due to weather conditions or operational factors which prevent an aircraft on arriv-

al of the flight at the first port from continuing inbound to interior ports scheduled for that flight.

(b) *Clearance and safety.* Clearance and entry of substitute aircraft is required as provided in this subpart for other aircraft.

(c) *Identification.* An identification of all substitute aircraft shall be clearly made on all clearance and entry documents.

(d) *Transporting cargo.* (1) *Forwarding.* The carrier may forward all cargo which arrived on one aircraft by transferring it to another aircraft of the same airline to complete the inbound flight. The transfer shall be done under Customs supervision.

(2) *Conditions.* All of the residue cargo from more than one inbound flight of an airline may be laden on one substitute aircraft of the airline. The substitute aircraft shall finish the inbound transport of the residue cargo.

§ 122.87 Other requirements.

Section 4.85 of this chapter, relating to vessels with residue cargo for domestic ports, applies to aircraft residue cargo, except as stated in this subpart.

§ 122.88 Aircraft carrying domestic (stopover) passengers.

Airlines that commingle domestic (stopover) passengers (that is, passengers who have already cleared Customs at their port of arrival and are continuing on another aircraft to a second U.S. destination) with international passengers who are continuing on the flight to their port of arrival and have not yet cleared Customs, must comply with certain requirements before being issued a permit to proceed. The carriers requirements are as follows:

(a) The domestic (stopover) passengers must be transported on U.S.-registered aircraft, or foreign-registered aircraft of the same foreign airline that brought them into the U.S.

(b) A $2.00 charge must be paid for each revenue producing domestic (stopover) passenger reinspected in the U.S. (see § 24.12 of this chapter).

(c) Arrangements must be made for the checked baggage of all passengers requiring inspection on the previously described flights to be off-loaded and made available for examination in the Federal inspection area at the destination port (intermediate or final) where an inspection is to take place.

(d) All stopover passengers shall be notified in writing, prior to boarding, that they will be subject to full reinspection by Customs. This written notification shall contain the following language: "Notice to all boarding passengers: You are boarding an aircraft on which passengers will be arriving in the U.S. from foreign destinations. These passengers have not yet cleared U.S. Customs. Accordingly, you will be subject to a full reinspection by Customs at your final U.S. port of entry."

(e) Domestic (stopover) passengers shall be provided a Customs declaration identified by the words "Domestic Flight". The domestic

(stopover) passenger is only required to complete items 1–4 on that declaration.

(f) The carrier shall present to Customs, as otherwise required by law, the permit to proceed and/or the general declaration, clearly stating the number of domestic (stopover) passengers to be reinspected upon arrival at the destination port (intermediate or final) where an inspection of passengers is to take place.

SUBPART J—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

§ 122.91 Application.

This subpart applies to the transportation in bond of merchandise arriving in the U.S. by aircraft and entered:

(a) for immediate transportation to another airport without appraisement; or

(b) for transportation through the U.S. and later exportation by aircraft.

§ 122.92 Procedure at port of origin.

(a) *Forms required.* (1) *Customs Form 7512.* Customs Form 7512 or other Customs approved documents shall be used for both entry and manifest. Three copies of the form or other document are required to be filed with Customs at the port of origin for merchandise for immediate transportation without appraisement. Four copies of the form or other document are required when merchandise for transportation and exportation is entered. (See also, §§ 18.11 and 18.20(a) of this chapter). Each copy shall be signed by the carrier or its authorized agent.

(2) *Customs Form 7512–C.* The "Origin" copy of Customs Form 7512–C shall be filed with Customs Form 7512, and its number shall be placed on all copies of Customs Form 7512.

(b) *Delivery of Customs form to carrier.* (1) *Merchandise entered for immediate transportation without appraisement.* When merchandise is entered for immediate transportation without appraisement, two copies of Customs Form 7512 or other Customs approved document, and the duplicate copy of Customs Form 7512–C shall be delivered to the carrier.

(2) *Merchandise entered for transportation and exportation.* When merchandise is entered for transportation and exportation, one copy of Customs Form 7512 and one copy of Customs Form 7512–C or other Customs approved document shall be delivered to the carrier.

(3) *After delivery.* After delivery, the forms or other document shall accompany the merchandise to the port of destination or exportation.

(c) *Receipt and supervision.* The agent of a bonded air carrier shall give a receipt for any merchandise delivered to it for transportation in bond, and no supervision of the lading of the merchandise on the transporting aircraft shall be required.

(d) *Split shipment.* (1) *Departure within 24 hours.* Merchandise covered by a single entry and manifest (Customs Form 7512 or other Customs approved document) may be sent to the destination airport on one or more aircraft. A separate manifest for each aircraft is not required if the whole shipment is sent within a single 24-hour period.

(2) *Departure not within 24 hours.* If any part of a shipment is sent more than 24 hours after the first part was sent, the entry and manifest copy which accompanies the first shipment shall state that the rest of the shipment will follow by separate aircraft. A single manifest shall be prepared for each part of the shipment sent by separate aircraft. The manifest shall be used as notice of each arrival at the destination airport.

(e) *Transhipment.* Merchandise sent under bond may be transferred at an intermediate airport to one or more aircraft of the same airline. This may be done without Customs supervision and notice of the transfer is not required. If merchandise covered by one entry and manifest is transferred to more than one aircraft, paragraph (d) of this section applies.

(f) *Sealing not required.* The sealing of aircraft, aircraft compartments carrying bonded merchandise, or the cording and sealing of bonded packages carried by the aircraft, is not required.

(g) *Warning labels.* The carrier shall supply and attach the warning label, as described in § 18.4(e) of this chapter, to each bonded package.

§ 122.93 Procedure at destination or exportation airport.

(a) *Delivery to district director.* When a bonded shipment arrives at the destination or exportation airport, the aircraft commander or agent shall deliver one copy of the entry and manifest with Customs Form 7512–C attached (Customs Form 7512 or other Customs approved document) covering the shipment to the district director of that airport as notice of arrival. If the shipment was sent by separate aircraft more than 24 hours after the first part of the shipment was sent, then a manifest for each part of the shipment shall be delivered to the district director.

(b) *Delivery to consignee.* When the merchandise is sent under an entry for immediate transportation without appraisal, one copy of the manifest covering the merchandise shall be delivered by the carrier to the consignee. This copy is used to make entry, and may also be used as a carrier certificate as provided in § 141.11(a)(4) of this chapter.

§ 122.94 Certificate of lading for exportation.

(a) *Required filing.* This section applies to merchandise entered for transportation and exportation by aircraft. A certificate of lading for exportation, Customs Form 7512 with Customs Form 7512–C attached, or other Customs approved document (see § 122.93 of this subpart) shall be filed when the merchandise reaches the final de-

parture airport. The form shall be filled out and signed at the place where aircraft clearance for the merchandise is given.

(b) *Clearance not at place of final departure.* If an aircraft is cleared at a place other than the place of final departure from the U.S., the aircraft commander or its authorized agent shall:

(1) promptly report arrival of any bonded merchandise for export to the Customs officer in charge at that place; and

(2) submit to the Customs officer in charge the certificate received at the place the merchandise was taken on board. The clearance certificate is kept by the Customs officer in charge until departure.

This procedure shall be followed at each place of landing before final departure.

§ 122.95 Other provisions.

Part 18 of this chapter (Transportation in Bond and Merchandise in Transit) applies to the transportation of merchandise under this subpart unless stated otherwise.

SUBPART K—ACCOMPANIED BAGGAGE IN TRANSIT

§ 122.101 Entry of accompanied baggage.

Passengers who enter the U.S. on one aircraft and depart to a foreign area on another aircraft with accompanying baggage shall either:

(a) submit their baggage to Customs for inspection; or

(b) arrange with the importing carrier for the baggage to be processed under regular in-transit procedures.

When passengers choose not to have access to their baggage while in the U.S., the baggage shall be listed on the Air Cargo Manifest as provided in § 122.48.

§ 122.102 Inspection of baggage in transit.

(a) General baggage in transit may be inspected upon arrival, while in transit, and upon exportation. Carriers shall present in-transit baggage for inspection at any time found necessary by the district director.

(b) In-transit baggage shall be presented to a Customs officer for inspection and clearance before the baggage can be delivered to a passenger while in the U.S.

SUBPART L—TRANSIT AIR CARGO MANIFEST (TACM) PROCEDURES

§ 122.111 Application.

Cargo (including manifested baggage) which arrives and is transported under Customs control in, through, or from, the U.S. may be transported in bond under this subpart. If cargo is not transported under this subpart, it shall be transported under other provisions of

this chapter. (See Subparts I and J of this part, and Parts 18 and 123 of this chapter).

§ 122.112 Definitions.

The following definitions apply in this subpart:

(a) *Transit air cargo.* "Transit air cargo" is cargo, including manifested baggage, transported under the requirements of this subpart.

(b) *Port of arrival.* The "port of arrival" is the port in the U.S. where imported cargo must be documented for further transportation under this subpart.

(c) *Transfer or transferred.* "Transfer or transferred" means the change of documentation of cargo to transit air cargo for transportation. The terms also include the physical movement of the cargo from one carrier to another, and thereafter by air or surface movement to the port of destination.

(d) *Transit air cargo manifest.* "Transit air cargo manifest" is used in this subpart as the shortened title for the transportation entry and transit air cargo manifest.

§ 122.113 Form for transit air cargo manifest procedures.

A manifest on Customs Form 7509 is required for transit air cargo, as provided in § 122.48(c) of this part. The words "Transportation Entry and Transit Air Cargo Manifest" shall be printed, stamped or marked on the form and on all copies of the form required for transit air cargo movement.

§ 122.114 Contents.

(a) *Form duplicates original manifest.* Each transit air cargo manifest shall be a duplicate of the sheet presented as part of the cargo manifest for the aircraft on which the cargo arrived in the U.S.

(b) *Shipments shown on manifest.* (1) *Country of exportation.* Each transit air cargo manifest sheet may list:

(i) only air cargo shipments from one exporting country, with the name of the country shown in the heading; or

(ii) air cargo shipments from several exporting countries, with the name of the exporting country shown in the "Nature of Goods" column.

(2) *Shipment to same port.* Each transit air manifest sheet may list only those shipments manifested by way of the port of arrival for:

(i) The same Customs port of destination;

(ii) The same Customs port for later exportation; or

(iii) Direct exportation from the port of arrival.

(c) *Information required.* Each air cargo manifest sheet shall show:

(1) The foreign port of lading;

(2) The date the aircraft arrived at the port of arrival;

(3) Each U.S. port where Customs services will be necessary due to transit air cargo procedures; and

(4) The final port of destination in the U.S., or the foreign country of destination, for each shipment. The foreign country destination shown on the manifest must be the final destination, as shown by airline shipping documents, even though airline transport may be scheduled to end before the shipment arrives at the final destination.

(d) *Corrections.* If corrections in the route shown on the original manifest for the cargo are required at the port of arrival to make a manifest sheet workable as a transit air cargo manifest, the district director at the port of arrival may allow the corrections.

§ 122.115 Labeling of cargo.

A warning label, as required by § 18.4(e) of this chapter, shall be attached to all transit air cargo not directly exported from the port of arrival before the cargo leaves the port of arrival.

§ 122.116 Identification of manifest sheets.

When the original cargo manifest for the aircraft on which the cargo arrives is presented by the aircraft commander or its authorized agent at the port of arrival, a manifest number will be given to the aircraft entry documents by Customs. The number given shall be used by the airline to identify all copies of the transit air cargo manifest. All copies of the manifest shall be correctly numbered before cargo will be released from the port of arrival as transit air cargo.

§ 122.117 Requirements for transit air cargo transport.

(a) *Transportation.* (1) *Port to port.* Transit air cargo may be carried to another port only when a receipt is given, as provided in paragraph (b) of this section. The receipt may be given only to an airline which:

(i) is a common carrier for the transportation of bonded merchandise; and

(ii) has the required Customs bond on file.

(2) *Exportation from port of arrival.* Transit air cargo may be exported from the port of arrival only if covered by a bond on Customs Form 301, containing the bond conditions set forth in Subpart G of Part 113 of this chapter, as provided in § 18.25 of this chapter.

(b) *Receipt.* (1) *Requirements.* When air cargo is to move from the port of arrival as transit air cargo, a receipt shall be given. The receipt shall be made by the airline responsible for transport or export within the lay order period, or an authorized extension period (see § 4.37 of this chapter).

(2) *Contents.* The receipt shall appear on each copy of the transit air cargo manifest, clearly signed and dated if required, in the following form:

Received the cargo listed herein for delivery to Customs at the port of destination or exportation shown above, or for direct exportation.

Name of Carrier (or Exporter)

Attorney or Agent of Carrier (or Exporter)

Date

(c) *Responsibility for transit air cargo.* (1) *Direct exportation.* The responsibility of the airline exporting transit air cargo for direct exportation begins when a receipt, as provided in paragraph (b) of this section, is presented to Customs.

(2) *Other than direct exportation.* When the transit air cargo is not for direct exportation, the responsibility of the airline receiving the cargo begins when a receipt, as provided in paragraph (b) of this section, is presented to Customs.

(3) *Carting.* When carting is used to delivery transit air cargo to receiving airlines, the importing airline is responsible for the cargo under its own bond until a receipt is filed by the receiving airline. This does not apply when the carting is done under Part 112 of this chapter, at the expense of the parties involved.

(4) *Importing airlines.* An importing airline which has qualified as a carrier of bonded merchandise, whether registered in the U.S. or a foreign area, may:

(i) give a receipt for the air cargo;

(ii) file an appropriate bond; and

(iii) deliver the cargo to an authorized domestic carrier for in-bond transportation from the port of arrival. The importing carrier's bond covers the transportation.

(d) *Split shipments.* A receipt shall be given by one airline for all of the cargo shipments listed on one transit air cargo manifest sheet. Cargo shipments so listed shall be transported from the port of arrival on one aircraft or carrier unless the use of more than one aircraft or carrier would be allowed:

(1) by § 122.92(d) under a single combined entry and manifest;

(2) by § 122.118(d); or

(3) by § 122.119(e), permitting the use of a surface carrier for transport.

Otherwise, all shipments on the transit air cargo manifest shall be separately documented and transported under the regular procedures for transportation of merchandise in bond (See Subpart J).

§ 122.118 Exportation from port of arrival.

(a) *Application.* Transit air cargo may be transferred for exportation from any port of arrival under this section. The district direc-

tor may require any supervision necessary to enforce the regulations of other Federal agencies.

(b) *Time.* Transit air cargo shall be exported from the port of arrival within 10 days from the date the exporting airline receives the cargo. After the 10-day period, the individual cargo shipments must be made the subject of individual entries, as appropriate.

(c) *Transit air cargo manifest copies.* Three copies of the transit air cargo manifest shall be filed with Customs.

(1) *Review copy.* The importing airline shall file a copy of each transit air cargo manifest sheet covering any cargo shipment that will be transferred for direct exportation. This filing shall be made as soon as the exporting airline has been chosen. The exporting airline need not give receipt on the review copy for the cargo to be transferred, but the name of the exporting airline shall be placed on the copy.

(2) *Exportation copy.* The exportation copy shall be filed by the exporting airline when clearance documents are presented to Customs.

(3) *Clearance copy.* The clearance copy shall be filed with the exporting aircraft's clearance documents.

The exportation and clearance copies shall show the exporting airline's receipt for the cargo, aircraft number, flight number, and the date.

(d) *Direct export on different aircraft.* Transit air cargo shipments which are listed on one aircraft transit air cargo manifest sheet may be directly exported on different aircraft of the exporting airline. If this occurs, two additional copies of the transit air cargo manifest shall be filed for each shipment or group of shipments transported in other aircraft. Each copy of the transit air cargo manifest shall be clearly marked to show which shipment or shipments listed are covered by the manifest copy.

(e) *Direct export by another airline.* If shipments listed on one transit air cargo manifest sheet are not exported from the same port on the same airline, separate export entries on Customs Form 7512, as required by § 18.25 of this chapter, shall be filed.

(f) *Post entered air cargo.* Air cargo not listed on the manifest (i.e., overages) which has been post entered under § 122.49(b) may be exported from the port of origin under this subpart. If this occurs, four copies of the air cargo manifest, Customs Form 7509, marked "Post Entry", shall be provided. All requirements of § 122.44(b) shall be followed in using this procedure.

(g) *Review.* The review copy of the transit air cargo manifest sheets must be reviewed by Customs as required for the carrier manifest copy in § 122.120(g). The reviewing officer shall take the proper action if a license is necessary for any cargo. The exporting airline shall be notified that any transit air cargo which is not covered by the required license must be placed under constructive Cus-

toms custody in a special area of the airline's terminal until the license is obtained.

§ 122.119 Transportation to another U.S. port.

(a) *Application.* Air cargo shipments may be transferred for transportation as transit air cargo from the port of arrival to another port in the U.S. under this section. The district director of the port of arrival may require Customs supervision of the transfer.

(b) *Time.* Transit air cargo traveling to a final port of destination in the U.S. shall be delivered to Customs at its destination within 15 days from the date the receiving airline gives the receipt for the cargo at the port of arrival.

(c) *Transit air cargo manifest copies.* Four copies of the transit air cargo manifest, including a carrier manifest copy, and two copies of Customs Form 7512–C (original and duplicate) shall be filed by the airline giving a receipt for moving the cargo shipments to their destination.

(1) *Permit copy.* This copy is used and kept by Customs at the port of arrival.

(2) *Customs Form 7512–C (duplicate).* This copy accompanies the transit air cargo to the port of destination.

(d) *Failure to deliver on time.*

(1) *Procedure.* If transit air cargo does not arrive at the destination port on time, the district director at the port of arrival shall take action as provided in §§ 18.6 and 18.8 of this chapter. The amount of duty and tax shall be decided at the port of arrival on the basis of information:

(i) on the permit copy kept at the port of arrival; and

(ii) obtained from the carriers as necessary.

The district director at the port of arrival shall notify the airline that presented a receipt for the cargo that there has been a failure to deliver.

(2) *Responsibility of airline.* When the airline that presented a receipt for the cargo receives notice of discrepancies, the airline shall answer within 90 days of the date of such notice to the district director at the port of arrival. The answer shall provide any information or documents related to the value and description of the cargo involved that the receipting airline and the importing airline can produce.

(e) *Surface movement to port of destination.* If an aircraft arrives at the port of arrival with cargo to be carried as transit air cargo, the cargo may be transferred to another carrier for surface movement to the port of destination. The transfer is allowed under the following conditions:

(1) the bond of the party receiving the cargo for surface movement must cover the transfer and surface movement;

(2) the description of the cargo on the transit air cargo manifest must be complete;

(3) the entire shipment listed in the transit air cargo manifest must be shipped from the port of arrival to the port of destination by the same surface carrier; and

(4) the requirements of § 122.114(b) must be followed.

§ 122.120 Transportation to another port for exportation.

(a) *Application.* Air cargo may be transferred as transit air cargo at the port of arrival for transportation to another port in the U.S. and later exportation under this section.

(b) *Supervision.* (1) *From port of arrival to exportation port.* The district director at the port of arrival shall order any supervision found necessary for the transfer of transit air cargo for transportation to another port for export.

(2) *At exportation port.* Customs shall be notified far enough in advance to be able to make any required supervision of the lading of cargo, and to enforce any other Federal agency requirements, when transit air cargo is ready for lading on the exporting aircraft.

(c) *Time.* Transit air cargo covered by this section shall be delivered to Customs at the port of exportation within 15 days from the date of receipt by the forwarding airline.

(d) *Transit air cargo manifest copies.* Five copies of the transit air cargo manifest and a Customs Form 7512–C (original and duplicate) shall be filed with Customs.

(1) *Port of arrival.* Two copies of the transit air cargo manifest, marked separately as "permit" and "control" copies, and Customs Form 7512–C (original) shall be filed with Customs at the port of arrival. The duplicate shall accompany the shipment as provided in § 122.119(c)(2) of this part. Filing shall be made when the arriving aircraft enters, or before the lay order period ends, by the airline which presents a receipt to transport the cargo from the port of arrival to the port of destination.

(2) *Port of exportation.* Three copies of the transit air cargo manifest shall be filed at the port of exportation.

(i) *Carrier manifest copy.* The carrier manifest copy shall be attached to the listing of cargo shipments and submitted when the cargo arrives at the exportation port.

(ii) *Exportation and clearance copies.* Two copies, marked separately as "exportation" and "clearance" copies, shall be filed with Customs at the exportation port.

(e) *Delivery to exporting airline.* When the transit air cargo arrives at the exportation port, it may be delivered directly to the exporting carrier, together with the exportation and clearance copies. The name of the exporting carrier shall be clearly noted on the carrier manifest copy, which shall then be delivered to Customs.

(f) *Storage by exporting airline.* The exporting carrier shall keep all cargo listed on the transit air cargo manifest in one storage space. This storage space shall be separate from the area in which

special shipments which require a license under paragraph (g) of this section are stored.

(g) *Export license.* (1) *Review.* A Customs officer shall review the carrier manifest copy of the transit air cargo manifest to make sure that the export licensing requirements of other Federal agencies have been followed.

(2) *Information inadequate.* If the manifest information is not enough for Customs to determine that a license or other requirement applies, then the transit air cargo shall be checked by examination, or by inspection of the air waybills or attached invoices.

(3) *When license or other requirement applies.* The exporting airline shall be notified at once if Customs finds that the shipment cannot be exported without a license or other approval. The shipment shall then be put under constructive Customs custody in a special area set aside for the shipment in the exporting airline's cargo terminal.

(h) *Filing of exportation and clearance copies.* (1) *Information.* When filed with Customs, the exportation and clearance copies of the transit air cargo manifest shall each show:

(i) the aircraft number;

(ii) the aircraft flight number; and

(iii) the date.

(2) *Filing.* The exporting airline shall file the exportation and clearance copies before the aircraft that carries the transit air cargo departs. The clearance copies shall be grouped together and not mixed in with other outward manifest sheets. The exportation copies shall be grouped together, and kept separate from the outward clearance documents.

(i) *Cargo not laden at same airport by same airline.* If all the cargo listed on one transit air cargo manifest sheet is not laden for exportation from the same U.S. airport by the same airline, then separate entries on Customs Forms 7512 and 7512–C are required for each cargo shipment listed:

(1) for transportation and exportation under Subpart J of this part; or

(2) for direct exportation under § 18.25 of this chapter.

(j) *Cargo laden on more than one aircraft of same airline.* When any cargo shipment listed on the same transit air cargo manifest must be exported on more than one aircraft of the same airline, § 122.118(d) applies.

(k) *Failure to deliver.* If all or part of the cargo listed on the transit air cargo manifest is not accounted for with an exportation copy within 40 days, the district director at the port of arrival shall take action as provided in § 122.119(d).

SUBPART M—AIRCRAFT LIQUOR KITS

§ 122.131 Application.

(a) *Liquor and tobacco.* Subpart M applies to: (1) duty-free and tax-free liquor and tobacco; and

(2) duty-paid and tax-paid liquor and tobacco which has been placed in the same liquor kit as duty-free and tax-free liquor and tobacco.

(b) *Aircraft.* Subpart M applies to all commercial aircraft on domestic or foreign flights operating into, from and between U.S. airports, which are carrying: (1) duty-free and tax-free liquor and tobacco withdrawn from bond under § 309, Tariff Act of 1930, as amended (19 U.S.C. 1309); or

(2) other liquor or tobacco on which duty or taxes have not been paid.

This includes any aircraft carrying duty-free and tax-free liquor under 19 U.S.C. 1309, or other Federal law, although the aircraft is not required to enter, clear or report arrival.

§ 122.132 Sealing of aircraft liquor kits.

(a) *Sealing required.* Aircraft liquor kits shall be sealed on board the aircraft by crewmembers before the aircraft lands in the U.S. The liquor kits shall be kept under seal while on the ground unless taken to an authorized airline in-bond liquor storeroom.

(b) *Exception.* When an aircraft is traveling between airports in the U.S., in a trade for which duty-free and tax-free liquor is used during flight, sealing the liquor kits on board during transporting stopovers is not required if:

(1) the liquor kits are kept on board the aircraft; and

(2) the district director finds that sealing is not required for revenue protection.

(c) *Seals to be used.* Aircraft liquor kits shall be sealed with serially numbered, Customs approved seals. The airline shall use seals supplied by an approved manufacturer, as provided in Part 24 of this chapter. A small number of seals may be obtained from the district director.

(d) *Removing seals.* When sealed liquor kits are on the ground, the Customs seals may be broken only by:

(1) a Customs officer; or

(2) authorized airline personnel, in an authorized airlines in-bond liquor storeroom.

(e) *Resealing.* When a Customs officer breaks the seal of a liquor kit to check the contents, the action shall be recorded on the liquor kit stores list, and the liquor kit must be resealed with an approved seal.

§ 122.133 Stores list required on arrival.

(a) *When required, contents.* Three copies of an incoming stores list shall be prepared for each liquor kit on board before an aircraft lands. The incoming stores list shall state for each type of liquor and bottle size the:

(1) number of full bottles;

(2) number of partially filled bottles; and

(3) total number of bottles.

If the carrier chooses not to state the type of liquor for each size bottle, any duty or taxes assessed for any shortage shall be set at the highest rate available for the alcoholic beverages in the kit.

(b) *Disposition of stores list copies.* One copy of the incoming stores list shall be placed in the liquor kit before it is sealed. The remaining two copies shall be used as follows:

(1) one copy shall be filed with the inward cargo manifest; and

(2) one copy shall be kept for filing with the outward cargo manifest if the liquor kit was laden for export.

(c) *For aircraft not required to enter and/or clear.* If an aircraft is not required to enter and/or clear:

(1) one copy shall be given to the Customs officer upon arrival; and

(2) one copy shall be kept to be given to the Customs officer before departure of the aircraft.

(d) *When stores list not prepared.* When a complete stores list is not prepared before landing, liquor kits must be sealed on board, and the seal number shall be recorded on the stores list. When the aircraft lands, the liquor shall be taken at once to the Customs office and the stores list shall be completed by crew members under Customs supervision.

§ 122.134 When airline does not have in-bond liquor storeroom.

(a) *Handling of liquor kits.* An aircraft may land at an airport where the airline involved does not have an authorized in-bond liquor storeroom. When this occurs, the liquor kits, under any supervision found necessary by the district director, may be:

(1) kept on board the aircraft;

(2) removed and replaced upon the aircraft, or

(3) removed and replaced aboard another aircraft.

(b) *Sealing of kits.* Aircraft liquor kits covered by this section shall remain sealed until departure. Customs officers may remove the seal to check the contents of the liquor kits, but shall reseal the kits as provided in § 122.132(e).

(c) *Restocking.* Additional amounts of duty-free and tax-free liquor and tobacco obtained in the U.S. shall be laden in a separate container on any aircraft covered by this section. The lading shall be done under any supervision the district director finds necessary.

The additional liquor and tobacco shall be shown on separate outward stores lists.

§ 122.135 When airline has in-bond liquor storeroom.

(a) *Restocking.* Liquor kits on board an aircraft landing at an airport where the airline involved has an authorized in-bond liquor storeroom may be removed and restocked in the storeroom.

(b) *Inventory record.* Each authorized airline in-bond liquor storeroom shall keep an inventory record in a form that satisfies the district director. The inventory record shall account for the receipt and use of all aircraft liquor and tobacco stores on which duty an/or tax has not been paid.

(c) *Airline employees.* Any airline which has an authorized in-bond liquor store room at an airport shall give the district director:

(1) A list of names of all airline employees authorized to break Customs seals on liquor kits in the in-bond liquor storeroom; and

(2) signature samples of the authorized employees.

(d) *Opening of aircraft liquor kits.* Aircraft liquor kits received in an authorized storeroom shall be opened only by authorized airline employees, or by Customs officers.

(e) *Contents of liquor kits.* The employees who break the seals on aircraft liquor kits shall check the contents at once. The employees shall immediately report to the district director any:

(1) evidence of seal tampering;

(2) difference between the seal numbers on the liquor kits and those recorded on the stores list; and

(3) differences in quantity as shown on the stores list.

(f) *Handling the liquor kits.* (1) *Partial bottles.* Partial bottles of liquor may be removed from incoming liquor kits and kept in the in-bond liquor storeroom to be destroyed or combined with other partial bottles. This may be done only under Customs supervision. The costs of Customs supervision shall be paid by the airline.

(2) *Exportation.* The contents of incoming liquor kits may be commingled to restock outbound liquor kits. The commingling must take place in the airline in-bond liquor storeroom, using liquor bottles on which the seal has not been broken.

(3) *Sealing.* All liquor kits shall be sealed as provided in § 122.132(a) before removal from the in-bond liquor storeroom. All seal numbers shall be listed on an outgoing stores list.

§ 122.136 Outgoing stores list.

(a) *Preparation.* Two copies of a serially numbered outgoing stores list shall be prepared by the airline for all liquor and tobacco withdrawn from bonded or non-tax-paid stock and added to liquor kits. The outgoing stores list shall show the total number of bottles for each type liquor, the brand, and the size of each bottle.

(b) *Use of copies.* The two copies of the outgoing stores list shall be used as follows:

(1) one copy shall be placed and kept in the outgoing kits until the aircraft leaves the U.S.; and

(2) one copy must be filed either with the outgoing cargo manifest (for aircraft required to clear) or with Customs before departing, as provided in § 122.133(c).

In both cases, the third copy of the inward stores list shall be filed with the outgoing stores list. (See § 122.133(c)).

§ 122.137 Certificate of use.

Any liquor or tobacco withdrawn from the in-bond storeroom and shown on the outgoing stores list shall be recorded, when exported, on a certificate of use prepared by the airline.

Subpart N—Flights To and From the U.S. Virgin Islands

§ 122.141 Definitions.

Under Subpart N, the following definitions apply:

(a) *United States.* The term "U.S." includes the several States, the District of Columbia and Puerto Rico.

(b) *Foreign area.* The term "foreign area" means any area other than the several States, the District of Columbia and Puerto Rico.

§ 122.142 Flights between the U.S. Virgin Islands and a foreign area.

(a) *Aircraft arriving in the U.S. Virgin Islands.* Aircraft arriving in the U.S. Virgin Islands from a place other than the U.S. are governed by the provisions of this part which apply to aircraft arriving in the U.S. from a foreign area.

(b) *Aircraft leaving the U.S. Virgin Islands.* Aircraft leaving the U.S. Virgin Islands for a place other than the U.S. are governed by the provisions of this part that apply to aircraft leaving the U.S. for a foreign area.

§ 122.143 Flights from the U.S. to the U.S. Virgin Islands.

(a) *In general.* Aircraft on flights from the U.S. to the U.S. Virgin Islands are governed by the provisions of this part that apply to aircraft on a flight within the U.S.

(b) *Bureau of the Census.* When Bureau of the Census regulations (15 CFR Part 30) apply to aircraft carrying merchandise to the U.S. Virgin Islands from the U.S., permission to depart must be obtained from the district director. Permission to depart shall not be given unless:

(1) a complete manifest and Shipper's Export Declarations as required by 15 CFR Part 30 are filed; or

(2) an incomplete manifest under 15 CFR 30.24 is filed and the complete manifest and shipper's Export Declarations are filed within 7 business days after departure.

§ 122.144 Flights from the U.S. Virgin Islands to the U.S.

(a) *Aircraft not inspected.* This paragraph applies to aircraft departing from the U.S. Virgin Islands and arriving in the U.S., without having been inspected prior to departure.

(1) *On departure.* Aircraft leaving the U.S. Virgin Islands for the U.S. are governed by the provisions of this part that apply to aircraft leaving the U.S. for a foreign area.

(2) *On arrival.* Aircraft departing from the U.S. Virgin Islands and arriving in the U.S. are governed by the provisions of this part that apply to aircraft arriving in the U.S. from a foreign area.

(b) *Supervision.* When aircraft are inspected by Customs in the U.S. Virgin Islands, the district director may order any supervision found necessary to protect the revenue and enforce the laws administered by Customs. This includes the collection of duty and taxes on articles bought in the U.S. Virgin Islands.

(c) *Procedure.* When an aircraft that was inspected in the U.S. Virgin Islands arrives in the U.S. from the U.S. Virgin Islands, the aircraft commander must be able to give evidence of the inspection to Customs on request. Evidence of the inspection shall be given in the following manner:

(1) A certificate on Customs Form 7507 shall be presented for aircraft registered in the U.S.:

(i) of domestic origin; or

(ii) of foreign origin, if duty has been paid and the aircraft is proceeding carrying neither passengers nor cargo, or with cargo and/or passengers solely from the U.S. Virgin Islands.

Two copies of the certificate shall be given to the inspecting Customs officers in the U.S. Virgin Islands by the aircraft commander. The certificate shall be marked with the port and date of inspection, and must be signed by the inspecting officer. The original of the certificate must be returned to the aircraft commander, who must keep the certificate for a reasonable time after the end of the flight to the U.S. If requested, the certificate shall be presented to Customs. The certificate may be destroyed or disposed of after a reasonable time at the discretion of the aircraft commander or agent.

(2) A permit to proceed on Customs Form 7507 shall be presented for aircraft registered in the U.S. which are:

(i) of foreign origin;

(ii) not duty paid; and

(iii) proceeding carrying neither passengers nor cargo.

The permit to proceed, as required by Subpart F of this part, shall be marked with the port and date of inspection, and shall be signed by the inspecting officer in the U.S. Virgin Islands.

(3) A permit to proceed on Customs Form 7507 shall be presented for aircraft registered in a foreign country and proceeding carrying neither passengers nor cargo. The permit to proceed, as required under Subpart F of this part, shall be marked with the port and

date of inspection, and shall be signed by the inspecting officer in the U.S. Virgin Islands.

(4) A permit to proceed, or other document, shall be filed as required under Subpart I of this part for an aircraft carrying residue cargo and/or passengers. The permit to proceed shall be marked with the port and date of inspection, and it must be signed by the inspecting officer in the U.S. Virgin Islands.

SUBPART O—FLIGHTS TO AND FROM CUBA

§ 122.151 Definitions.

Under this subpart, the following definitions apply:

(a) *United States.* The term "U.S." includes the several States, the District of Columbia, the U.S. Virgin Islands, and Puerto Rico.

(b) *Cuba.* The term "Cuba" does not include the Guantanamo Bay Naval Station.

§ 122.152 Application.

This subpart applies to all aircraft entering or departing the U.S. to or from Cuba except public aircraft. Public aircraft are covered by Subpart P.

§ 122.153 Limitations on airport of entry or departure.

The owner or person in command of any aircraft clearing the U.S. for, or entering the U.S. from, Cuba, whether the aircraft is departing on a temporary sojourn, or for export, shall clear or obtain permission to depart from, or enter at, the Miami International Airport, Miami, Florida, and comply with the requirements in this part unless otherwise authorized by the Regional Commissioner of Customs, Miami, Florida.

§ 122.154 Notice of arrival.

(a) *Application.* All aircraft entering the U.S. from Cuba shall give advance notice of arrival.

(b) *Procedure for giving advance notice of arrival.* The commander of an aircraft covered by this section shall give the advance notice of arrival not less than one (1) hour before crossing the U.S. coast or border. Notice shall be given either:

(1) Through Federal Aviation Administration flight notification procedure (see International Flight Information Manual, Federal Aviation Administration); or

(2) Directly to the Customs officer in charge at the Miami International Airport, Miami, Florida.

(c) *Contents of notice.* The advance notice of arrival shall state:

(1) Type of aircraft and registration number;

(2) Name of aircraft commander;

(3) Number of U.S. citizen passengers;

(4) Number of alien passengers;

(5) Place of last foreign departure;

(6) Estimated time and location of crossing the U.S. coast or border; and

(7) Estimated time of arrival.

§ 122.155 Document to be presented upon arrival.

Upon arrival, the aircraft commander shall present:

(a) A manifest of all passengers on board, as required by the U.S. Immigration and Naturalization Service pursuant to 8 CFR 231.1(b), to an officer of the U.S. Immigration and Naturalization Service or to a Customs officer acting as an Immigration officer;

(b) The documents required by Subpart E of this part.

§ 122.156 Release of passengers.

No passengers arriving from Cuba by aircraft will be released by Customs, nor will the aircraft be cleared or permitted to depart before the passengers are released by an officer of the Immigration and Naturalization Service or by a Customs officer acting on behalf of that agency.

§ 122.157 Documents required for clearance.

As a condition precedent to clearance, the aircraft commander shall present to Customs:

(a) The documents required by Subpart H of this part; and

(b) A validated license issued by the Department of Commerce, as provided for in 15 CFR 371.19 or a license issued by the Department of State, as provided in 22 CFR Part 123.

§ 122.158 Other entry and clearance requirements.

All other provisions of this part relating to entry and clearance of aircraft are applicable to aircraft subject to this subpart.

SUBPART P—PUBLIC AIRCRAFT

[RESERVED]

SUBPART Q—PENALTIES

§ 122.161 In general.

Except as provided in § 122.14, any person who violates any Customs requirements stated in this part, or any regulation that applies to aircraft under § 122.2, is, in addition to any other applicable penalty, subject to a civil penalty of $5,000 as provided by 49 U.S.C. App. 1474, except for overages, and failure to manifest narcotics or marihuana, in which cases the penalties set forth in § 584, Tariff Act of 1930, as amended (19 U.S.C. 1584) apply, or for failure to report arrival as required in which case the penalties set forth in § 436, Tariff Act of 1930, as amended (19 U.S.C. 1436) apply, and any aircraft used in connection with any such violation shall be subject to seizure and forfeiture, as provided for in the Customs laws. A penalty or forfeiture may be mitigated under Part 171 of this chapter.

§ 122.162 Failure to notify and explain differences in air cargo manifest.

(a) *Application.* Penalties shall be assessed if differences in an air cargo manifest (overages or shortages) are discovered and:

(1) the required notice and explanation are not made in time;

(2) the district director is not satisfied that the differences were caused by clerical error or other mistake;

(3) there has been a loss of revenue to the U.S.; or

(4) the district director is not satisfied that there was a valid reason for delay in reporting any differences.

(b) *Definition.* Under this section, "clerical error or other mistake" means a non-negligent, inadvertant, or typographical mistake, made when the manifest is prepared, assembled or submitted.

(c) *Repeated differences.* If repeated differences are found in manifests filed by the same person, it may be determined that the differences were a result of negligence and not clerical error or other mistake.

(d) *Knowledge.* A penalty may be assessed for differences in a manifest that are unknown to the aircraft commander or owner.

§ 122.163 Transit air cargo traveling to U.S. ports.

(a) *Application.* If transit air cargo is traveling from the port of arrival to another U.S. port under § 122.119, a liability shall be assessed, as set out in § 18.8 of this chapter if there has been:

(1) shortage in delivery;

(2) irregular delivery; or

(3) non-delivery.

(b) *Liabilities assessed.* The liabilities assessed under this section are imposed as liquidated damages under a carrier's bond.

(c) *Value of merchandise.* The district director shall determine the value of merchandise for assessment purposes based on the following factors:

(1) Any data or documents available to the airline which presented a receipt for the transit air cargo, and available to the importing airline relating to the description and value of the cargo; and

(2) Other information available to the district director relating to the same or similar merchandise. If the data or documents required by this section are not submitted within 90 days of the date requested, the district director shall determine value on the basis of other available information. The transit air cargo manifest does not reflect value.

§ 122.164 Transportation to another port for exportation.

If transit air cargo is traveling from port of arrival to another U.S. port for later exportation, any liquidated damages for shortages or irregular delivery shall be assessed as provided in § 122.163.

§ 122.165 Air cabotage.

(a) The air cabotage law (49 U.S.C. App. 1508(b)) prohibits the transportation of persons, property, or mail for compensation or hire between points of the U.S. in a foreign civil aircraft. The term "foreign civil aircraft" includes all aircraft that are not of U.S. registration except those foreign-registered aircraft leased or chartered to a U.S. air carrier and operated under the authority of regulations issued by the Department of Transportation, as provided for in 14 CFR 121.153, and those aircraft used exclusively in the service of any government.

(b) Customs officers detecting possible violations shall report the matter to Headquarters, Attention: Carrier Rulings Branch. Liability should not be assessed under 49 U.S.C. App. 1471 pending instructions from Headquarters since certain limited domestic transportation by foreign civil aircraft is permitted under regulations issued by the Department of Transportation.

§ 122.166 Arrival, departure, discharge, and documentation.

(a) *Liability for civil penalties.* Except as otherwise provided, any aircraft pilot violation of the requirements of § 433, Tariff Act of 1930, as amended, (19 U.S.C. 1433), with respect to the following actions shall be liable for civil penalties as provided by § 436, Tariff Act of 1930, as amended (19 U.S.C. 1436), and described in paragraph (c) of this section:

(1) Advance notification of arrival;

(2) Report of arrival;

(3) Landing of aircraft;

(4) Presentation of documentation;

(5) Departure from the port, place, or airport of arrival without authorization; or

(6) Discharge of passenger, or merchandise (to include baggage) without authorization.

(b) *Liability for criminal penalties.* Upon conviction, any aircraft pilot violating any of the Customs requirements described in paragraph (a) of this section shall, in addition to civil penalties be subject to criminal penalties as set forth in § 436, Tariff Act of 1930, as amended, (19 U.S.C. 1436), and described in paragraph (c) of this section. If the aircraft has or is discovered to have had on board any merchandise (other than the equivalent, for a vessel, of sea stores) the importation of which into the U.S. is prohibited, that person shall be subject to an additional fine as set forth in 19 U.S.C. 1436 and described in paragraph (c) of this section.

(c) *Civil and criminal penalties described.*

(1) *Civil penalty.* The pilot of any aircraft who fails to comply with the requirements of this section is liable for a civil penalty of $5,000 for the first violation, and $10,000 for each subsequent violation. Any aircraft used in connection with any such violation is subject to seizure and forfeiture.

(2) *Criminal penalty.* In addition to the civil penalty prescribed for violation of this section, the pilot of any aircraft who intentionally fails to comply with the requirements of this section is liable, upon conviction, for a fine of not more than $2,000 or imprisonment for 1 year, or both. If the aircraft is found to have, or to have had, on board any merchandise the importation of which is prohibited, such individual is liable for an additional fine of not more than $10,000 or imprisonment for not more than 5 years, or both.

(3) *Additional civil penalty.* If any merchandise, other than the equivalent of vessel sea stores, is imported or brought into the U.S. aboard an aircraft which has failed to comply with the requirements prescribed by this section, the pilot of the aircraft shall be liable for a civil penalty equal to the value of the merchandise, and the merchandise may be seized and forfeited, unless properly entered by the importer or consignee.

§ 122.167 Aviation smuggling.

(a) *Civil penalties.* Any aircraft pilot who transports, or any person on board any aircraft who possesses prohibited or restricted merchandise knowing, or intending, that the merchandise will be introduced into the U.S. contrary to law shall be subject to a civil penalty of twice the value of the merchandise involved, but not less than $10,000, as prescribed in § 590, Tariff Act of 1930, as amended (19 U.S.C. 1590). Any aircraft used in connection with, or in aiding or facilitating, any violation of 19 U.S.C. 1590, whether or not any person is charged in connection with such violation, may be seized and forfeited in accordance with Customs laws.

(b) *Criminal penalties.* Any aircraft pilot or person who intentionally violates 19 U.S.C. 1590 is, upon conviction, subject to the criminal penalties of a fine of not more than $10,000 or imprisonment for not more than 5 years, or both, if none of the merchandise involved is a controlled substance. More severe penalties are provided in 19 U.S.C. 1590 if the smuggled merchandise is a controlled substance. In such case, a violator is liable for a fine of not more than $250,000 or imprisonment for not more than 20 years, or both.

(c) For purposes of imposing civil penalties under this section, any of the following acts, when performed within 250 miles of the territorial sea of the United States, shall be evidence that the transportation or possession of merchandise was unlawful and shall indicate that the purpose of the transfer was to make it possible for such merchandise, or any part of it, to be introduced into the U.S. unlawfully. For purposes of seizure and forfeiture, the following acts shall be evidence that an aircraft was used in connection with, or to aid or facilitate, a violation of this section;

(1) The operation of an aircraft without lights during such times as lights are required to be displayed under applicable law.

(2) The presence on an aircraft of an auxilliary fuel tank which is not installed in accordance with applicable law.

(3) The failure to correctly identify the aircraft by registration number and country of registration, when requested to do so by a customs officer or other government authority.

(4) The external display of false registration numbers of false country of registration.

(5) The presence on board of unmanifested merchandise, the importation of which is prohibited or restricted.

(6) The presence on board of controlled substances which are not manifested or which are not accompanied by the permits or licenses required under Single Convention on Narcotic Drugs or other international treaty.

(7) The presence of any compartment or equipment which is built or fitted out for smuggling.

CONFORMING AMENDMENTS TO THE REGULATIONS

Parts 4, 10, 18, 24, 123, and 162, Customs Regulations (19 CFR Parts 4, 10, 18, 24, 123, and 162), are amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 3, 2103.

2. Section 4.30(l) and (m) is amended by removing the references to "Part 6", and by inserting, in their places, references to "Part 122".

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The authority citation for Part 10 continues to read as follows:

Authority: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1623, 1624.

2. Section 10.41(c) is amended by removing the reference to "Part 6", and by inserting, in its place, a reference to "Part 122".

PART 18—TRANSPORTATION IN BOND AND MERCHANDISE IN TRANSIT

1. The authority citation for Part 18 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnt. 11), 1551, 1552, 1553, 1624.

2. Section 18.2(c)(2) is amended by removing the reference to "§ 6.21" and inserting, in its place, a reference to "§ 122.118".

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for Part 24 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnte. 11), 1624; 31 U.S.C. 9701.

2. Section 24.12(d) is amended by removing the reference to "§ 6.9(f)" and inserting, in its place, a reference to "§ 122.88".

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The authority citation for Part 123 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (Gen. Hdnte. 11), 1624.

2. Section 123.0 is amended by removing the reference to "Part 6" and inserting, in its place, a reference to "Part 122".

PART 162—RECORDKEEPING, INSPECTION, SEARCH, AND SEIZURE

1. The authority citation for Part 162 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624.

2. Section 162.72(b)(3)(ii) is amended by removing the references to "§ 6.11" and inserting, in its place, a reference to "§ 122.161".

3. Section 162.72(c) is amended by removing the reference to "§ 6.7(h)(5)" and inserting, in its place, a reference to "§ 122.612".

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: March 8, 1988.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

PARALLEL REFERENCE TABLE

(This table shows the relationship of sections in revised Part 122 to superseded Part 6)

Revised section	Superseded section
122.0	New.
122.1(a)	New.
122.1(b)	6.1(e).
122.1(c)	6.1(g).
122.1(d)	New.
122.1(e)	6.1(h).
122.1(f)	New.
122.1(g)	Based on 19 CFR 24.18.
122.1(h)	New.
122.1(i)	New.
122.1(j)	New.
122.1(k)	6.1(f).
122.1(l)	6.1(b), (c).
122.2	6.10.
122.3	6.6(b).
122.4	6.6(a).
122.5	6.6(a).
122.11(a)	6.12(a), (b), (d).
122.11(b)	6.12(c).
122.11(c)	6.12(e).
122.12(a)	6.12(f).
122.12(b)	6.12(g).
122.12(c)	6.12(h).
122.12(d)	6.12(i).
122.13	6.13.
122.14	6.12a.
122.21	New.
122.22	New.
122.23(a)	New.
122.23(b), (c), (d), (e)	6.14(a).
122.24(a), (b)	6.14(b), (g).
122.25(a), (b), (c), (d)	6.14(f).
122.26	New.
122.27	Based on 19 CFR 148.5.
122.28	Based on 19 CFR 148.32.
122.29	New.
122.30	6.10 and 6.11.
122.31(a)	6.2(b)(1).
122.31(b)	6.2(b)(3).
122.31(c)(2)	6.2(b)(2).
122.31(d)	6.2(b)(4).
122.31(e)	6.2(b)(5).
122.31(f)	6.2(b)(1).
122.32	6.2(a).
122.33	6.2(a).
122.34	6.2(a).
122.35	6.2(h).
122.36	6.2(b)(6).
122.37	6.2(h).
122.38(a)	6.2(e), (f).
122.38(b)	6.2(e), (f).
122.38(c)	6.2(g).
122.38(d)	6.2(e), (f).
122.38(e)	6.2(g)

PARALLEL REFERENCE TABLE—Continued

(This table shows the relationship of sections in revised Part 122 to superseded Part 6)

Revised section	Superseded section
122.38(f)	New. Based on Customs Circular INS–2–EV, dated 12–14–61.
122.41	6.3(a), 6.4(a), (b) and 6.9(c).
122.42	6.3(b), 6.4(c), and 6.7.
122.43(a), (c)	6.7(a), (b).
122.43(b)	New. Based on Customs Circular AIR–4–ICS, dated 1–24–68.
122.44	New. Based on Customs Circular BAG–3–CO (AIR–4–AIR), dated 8–9–65.
122.45	6.7(b)(1).
122.45(d)	New. Based on Customs Circular BAG–3–CO (AIR–4–AIR), dated 8–9–65.
122.46(a)	6.7(b)(2).
122.46(b)	6.7(b)(2). Also based on Customs Circular AIR–4–ICS, dated 1–24–68.
122.46(c)	6.7(b)(2).
122.47(a)	6.7(f).
122.47(b)	6.7(f).
122.47(c)(1)	6.7(b)(3)(v).
122.47(c)(2)	6.7(b)(3)(V), (vi).
122.47(d)	6.7(f).
122.48(a), (b), (c), (d)	6.7(b)(3).
122.48(e)	New. Based on Customs Circular ATR–7–IEI, dated 1–31–72.
122.49(a)	6.7(h)(1), (2).
122.49(b), (c), (d), (e), (f)	6.7(h)(1), (3). Also based on 19 CFR 4.12(a).
122.51	6.2(d)(3).
122.52(a), (b), (c)	6.2(d)(3).
122.52(d)	6.2(d)(3)(ii). Also based on T.D. 55063(1), dated 3–4–60.
122.53	New. Based on 14 CFR 121.153.
122.54(a), (b), (c), (d), (e), (f)	6.2(d)(1).
122.54(g)	6.2(d)(2).
122.61(a)	6.3(c).
122.62(a), (b), (c)	6.3(c).
122.63(a), (b)	6.5(c).
122.64	6.3(d).
122.65	New.
122.71	6.8(a).
122.72	6.8(a).
122.73	6.8(b). Also based on T.D. 82–92, dated March 22, 1982.
122.74(a)	6.8(a). Also based on 15 CFR 30.24.
122.74(b)	6.8(a).
122.74(c)	6.8(a). Also based on 15 CFR 30.24(a).

PARALLEL REFERENCE TABLE—Continued

(This table shows the relationship of sections in revised Part 122 to superseded Part 6)

Revised section	Superseded section
122.74(c)(1)	6.8(a). Also based on 15 CFR 30.24(a).
122.74(c)(2)	6.8(e). Also based on 15 CFR 30.24(a)(1).
122.74(c)(3)	6.8(a). Also based on 15 CFR 30.24(a)(1).
122.74(d)	6.8(e).
122.75(a)(1), (2)	6.8(e). Also based on 15 CFR 30.21(b).
122.75(b)	6.8(e).
122.76	6.8(a). Also based on 15 CFR 30.1.
122.77	6.8(d).
122.78	6.8(c).
122.79(a), (b)	6.3(c) and 6.5(b).
122.80	6.8(e).
122.81	6.9(a).
122.82	6.9(a). Also based on 19 CFR 4.85(a), 19 CFR 113.13a(a), (b) and 19 CFR 113.61.
122.83(a), (b), (c), (d)	6.9(b).
122.83(e)	6.9.
122.83(f)	6.9(b).
122.84(a), (b), (c), (d)	6.9(c).
122.85	6.9(d).
122.86	New. Based on Customs Circular AIR–7–EV, dated 11–23–59.
122.87	6.9(e).
122.88	6.9(f).
122.91	6.15(a).
122.92(a), (b)	6.15(b)(1), (2).
122.92(c)	6.15(b)(3).
122.92(d)	6.15(b)(4).
122.92(e)	6.15(b)(5).
122.92(f), (g)	6.15(b)(6).
122.93(a)	6.15(c).
122.93(b)	6.15.
122.94(a), (b)	6.16.
122.95	6.15(a).
122.101	New. Based on Customs Circular AIR–7–IEI, dated 1–31–72.
122.102	New. Based on Customs Circular AIR–7–IEI, dated 1–31–72.
122.111	6.17.
122.112(a), (b), (c)	6.17.
122.112(d)	6.18(a).
122.113	6.18(a).
122.114(a)	6.18(a). Also based on Customs Circular AIR–7–EV, dated 5–8–62.
122.114(b)	6.18(b).
122.114(b)(2)	6.18(b).
122.114(c)	6.18(d).
122.114(d)	New based on Customs Circular AIR–7–EV, dated 5–8–62.

PARALLEL REFERENCE TABLE—Continued

(This table shows the relationship of sections in revised Part 122 to superseded Part 6)

Revised section	Superseded section
122.115	6.18(e). Also based on Customs Circular AIR–7–EV, dated 5–8–62.
122.116	6.19.
122.117(a)	6.20(c).
122.117(b)	6.20(b), (d).
122.117(c), (d)	6.20(c).
122.118(a)	6.24(a).
122.118(b)	6.21(c).
122.118(c)	6.24(b), (c).
122.118(d)	6.24(g).
122.118(e)	New. Based on 19 CFR 18.25.
122.118(f)	New. Based on Customs Circular AIR–7–CO, dated 3–17–65.
122.118(g)	6.24(d).
122.119(a)	6.22(a).
122.119(b)	6.21(a).
122.119(c)	6.22(a). Also based on Customs Circular TRA–1–IMS, dated 7–15–68.
122.119(d)	6.22(c), (d).
122.119(e)	6.22(a).
122.120(a)	6.23(a).
122.120(b)(1)	6.23(a).
122.120(b)(2)	6.23(c).
122.120(c)	6.21(b).
122.120(d)	6.23.
122.120(e)	6.23(b).
122.120(f)	6.23(c).
122.120(g)	6.23(e).
122.120(h)	6.23(d).
122.120(i), (j)	6.23(h).
122.120(k)	6.23(g).
122.131 through 122.137	New. Based on Customs Circular AIR–7–AIR, dated 6–16–64.
122.141	New definition section.
122.142	6.25(a).
122.143	6.25(b).
122.144(a)(1)	6.25(c)(1).
122.144(a)(2)	6.25(c)(2).
122.144(b)	6.25(c)(3).
122.144(c)	6.25(c)(4).
122.151 through 122.158	6.3a.
122.161	6.11.
122.162	6.7(h).
122.163	6.22(e).
122.164	6.23(g).
122.165	New. Based on Customs Circular AIR–4–CR, dated 11–12–72.
122.166	New based on 19 U.S.C. 1433 and 1436.
122.167	New based on 19 U.S.C. 1433 and 1436.

PARALLEL REFERENCE TABLE

(This table shows the relationship of sections in revised Part 6 to superseded Part 122)

Revised section	Superseded section
6.1(b), (c)	122.1(1).
6.1(e)	122.1(b).
6.1(f)	122.1(k).
6.1(g)	122.1(c).
6.1(h)	122.1(e).
6.2(a)	122.32, 122.33, 122.34.
6.2(b)	122.31.
6.2(b)(6)	122.36.
6.2(d)(1)	122.54(a) through (f).
6.2(d)(2)	122.54(g).
6.2(d)(3)	122.51 and 122.52.
6.2(e), (f)	122.38(a), (b), (d), (e) and (f).
6.2(g)	122.38(c).
6.2(h)	122.35 and 122.37.
6.3(a)	122.41.
6.3(b)	122.42(a), (b).
6.3(c)	122.61(a), 122.62(a), (b), (c) and 122.79(a).
6.3(d)	122.64.
6.3a	122.151 through 122.158.
6.4(a) and (b)	122.41.
6.4(c)	122.42(b).
6.5(b), (c)	122.63(a), (b) and 122.79(b).
6.6(a)	122.4 and 122.5.
6.6(b)	122.3.
6.7(a)	122.43(a).
6.7(b)	122.43(c), 122.45, 122.46(a), (b), (c) and 122.47(c).
6.7(f)	122.47(a), (b), and (d).
6.7(h)	122.49, and 122.162.
6.8(a)	122.71, 122.72, 122.74(a), (b), and (c)(1) and (3) and 122.76.
6.8(b)	122.73.
6.8(c)	122.78.
6.8(d)	122.77.
6.8(e)	122.74(c)(2), 122.74(d), 122.75(a), (1) and (2), 122.75(b) and 122.80.
6.9(a)	122.81 and 122.82.
6.9(b)	122.83.
6.9(c)	122.84.
6.9(d)	122.85.
6.9(e)	122.87.
6.9(f)	122.88.
6.10	122.2, 122.30 and 122.161.
6.11	122.161.
6.12(a), (b), (d)	122.11(a).
6.12(c)	122.11(b).
6.12(e)	122.11(c).
6.12(f), (g), (h), (i)	122.12.
6.12a	122.14.
6.13	122.13.
6.14(a)	122.23(b), (c), (d), (e).
6.14(b), (g)	122.24(a), (b).
6.14(f)	122.25.
6.15(a)	122.91 and 122.95.
6.15(b)	122.92.
6.15(c)	122.93.

PARALLEL REFERENCE TABLE—Continued

(This table shows the relationship of sections in revised Part 6 to superseded Part 122)

Revised section	Superseded section
6.16	122.94.
6.17	122.111 and 122.112(a), (b), (c).
6.18(a)	122.112(d), 122.113, and 122.114(a).
6.18(b)	122.114(b).
6.18(d)	122.114(c).
6.18(e)	122.114(e).
6.19	122.116.
6.20(b), (d)	122.117(b).
6.20(c)	122.117(a), (c), and (d).
6.21(a)	122.119(b).
6.21(b)	122.120(c).
6.21(c)	122.118(b).
6.22(a)	122.119(a), (c), and (e).
6.22(c), (d)	122.119(d).
6.22(e)	122.163.
6.23(a)	122.120(a) and (b)(1).
6.23(b)	122.120(e).
6.23(c)	122.120(b)(2) and (f).
6.23(d)	122.120(h).
6.23(e)	122.120(g).
6.23(g)	122.120(k) and 122.164.
6.23(h)	122.120(i), (j).
6.24(a)	122.118(a).
6.24(b), (c)	122.118(c).
6.24(d)	122.118(g).
6.24(g)	122.118(d).
6.25(a)	122.142.
6.25(b)	122.143.
6.25(c)(1)	122.144(a)(1).
6.25(c)(2)	122.144(a)(2).
6.25(c)(3)	122.144(b).
6.25(c)(4)	122.144(c).
6.25(c)(5)	122.144(d).

[Published in the Federal Register, March 22, 1988 (53 FR 9285)]

(T.D. 88–13)

COMMERCIAL GAUGER CONDITIONAL APPROVAL

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: Notice of conditional approval.

SUMMARY: Pursuant to § 151.13 of the Customs Regulations (19 CFR 151.13), Amspec, Inc., 1901 E. Linden Ave., Bldg 17, Linden, New Jersey 07036–1110, applied to Customs for approval to gauge imported petroleum and petroleum products, single organic chemicals in bulk, and animal and vegetable oils. Customs has deter-

mined that Amspec meets all of the requirements for approval as a commercial gauger.

In accord with § 151.13(e) of the Customs regulations, Amspec, Inc., is hereby granted conditional approval to gauge the products named above in all Customs districts. This conditional approval will expire in six months unless it is superseded by permanent approval.

EFFECTIVE DATE: March 14, 1988.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Office of Technical Services, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229, (202–566–2446).

Dated: March 16, 1988.

ROGER J. CRAIN,
Special Assistant for Commercial and Tariff Affairs, Office of Technical Services.

[Published in the Federal Register, March 21, 1988 (53 FR 9169)]

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19 CFR Part 101

(T.D. 88–14)

CHANGE IN THE CUSTOMS SERVICE FIELD ORGANIZATION—PORT MANATEE, FLORIDA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to establish a new Customs port of entry to be known as Port Manatee in the Tampa, Florida, Customs District of the Southeast Region. The change is part of a Customs continuing program to obtain more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the public.

EFFECTIVE DATE: April 18, 1988.

FOR FURTHER INFORMATION CONTACT: Bernie Harris, Office of Inspection and Control (202–566–9425).

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of Customs continuing program to obtain more efficient use of its personnel, facilities and resources, and to provide better service to carriers, importers, and the public, Customs published a notice in the Federal Register on August 25, 1987 (52 FR 32025) proposing to amend § 101.3, Customs Regulations (19 CFR 101.3), to

change the Customs field organization by establishing a new Customs port of entry at Port Manatee, Florida, within the Tampa, Florida, Customs District, Southwest Region.

Discussion of Comments

Three comments were received in response to the Federal Register notice. Two comments strongly supported the proposal. A third comment expressed some concern about a possible reduction of Customs service presently provided at Tampa which may be caused by the creation of a new port of entry. Since we already service Port Manatee out of our Tampa location, the assignment of a Customs officer thereto would not affect our current ability to service Tampa. Therefore, after further review of the matter, Customs has determined that it is in the public interest to establish a Customs port of entry at Port Manatee, Florida.

Geographical Description

The geographical limits of Port Manatee, Florida, will be that portion of Manatee County bounded on the north by the Manatee-Hillsborough County line, on the east by U.S. Interstate Highway I–75, on the south by State Highway 64, but excluding the western offshore island communities of Anna Maria, Bradenton Beach, Holmes Beach, and Longboat Key.

Authority

This change is made under the authority vested in the President by § 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by E.O. 10289, September 17, 1951 (3 CFR 1949–1953 Comp., Ch. II), and pursuant to the authority provided by Treasury Department Order No. 1010–5 (47 FR 2449).

List of Subjects in 19 CFR Part 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

Amendments to the Regulations

PART 101—GENERAL PROVISIONS

1. The authority citation for Part 101, Customs Regulations (19 CFR Part 101), continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 1, 66, 1202 (Gen. Hdnote 11), 1624, Reorganization Plan 1 of 1965: 3 CFR 1965 Supp.

2. To reflect this change, the list of Customs regions, districts, and ports of entry in § 101.3(b), Customs Regulations (19 CFR 101.3(b)), is amended by inserting in appropriate alphabetical order, "Port Manatee, including the territory described in T.D. 88–14" in

the column headed "Ports of entry" in the Tampa, Florida, Customs District of the Southeast Region.

REGULATORY FLEXIBILITY ACT

The provisions of the Regulatory Flexibility Act relating to an initial and final regulatory flexibility analysis (5 U.S.C. 603, 604) are not applicable to this document. Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the U.S. to accommodate the volume of Customs-related activity in various parts of the country. Although this change may have a limited effect upon small entities in the Tampa, Florida, area, it is not expected to have a significant economic impact upon a substantial number of small entities to the extent contemplated by the Regulatory Flexibility Act. Accordingly, it is certified under the provisions of § 3 of the Regulatory Flexibility Act (5 U.S.C. 605(b)) that the amendment will not have a significant economic impact on a substantial number of small entities.

EXECUTIVE ORDER 12291

Because the amendment relates to the Customs field organization, and will not result in a "major rule" as defined in E.O. 12291, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was Arnold L. Sarasky, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

WM. ROSENBLATT,
Acting Commissioner of Customs.

Approved: March 1, 1988.

FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, March 17, 1988 (53 FR 8746)]

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19 CFR Part 4

(T.D. 88–15)

CUSTOMS REGULATIONS AMENDMENT REMOVING ECUADOR FROM THE LIST OF COUNTRIES ENTITLED TO SPECIAL TONNAGE TAX EXEMPTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This rule amends the Customs Regulations by removing Ecuador from the list of nations whose vessels are exempted from the payment of any higher tonnage duties than are applicable to vessels of the U.S. and from the payment of light money. The Department of State has informed Customs that U.S. vessels have been paying lighthouse fees in Ecuadorian ports since at least 1983, in apparent violation of a reciprocal agreement under which the vessels of neither country would be assessed such duties. Exemption from the assessment of such duties is a privilege which is extended to vessels of countries which extend such privileges to U.S. vessels. Since U.S. vessels are no longer exempt from special tonnage fees and light money in Ecuador, the privileges regarding exemption from the payment of such duties at U.S. ports will no longer be extended to vessels registered in Ecuador.

EFFECTIVE DATE: February 4, 1988.

FOR FURTHER INFORMATION CONTACT: Paul Hegland, Carrier Rulings Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229, (202–566–5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified amount per ton, known as "light money", on all foreign vessels which enter United States ports (46 U.S.C. 121, 128). However, vessels of a foreign nation may be exempted from the payment of special tonnage taxes and light money upon presentation of proof, satisfactory to the President, that no discriminatory duties of tonnage or imposts are imposed by that foreign nation on U.S. vessels or their cargoes (46 U.S.C. 141). Section 4.22, Customs Regulations (19 CFR 4.22), lists those nations whose vessels have been exempted from the payment of any higher tonnage duties than are applicable to vessels of the U.S., and from payment of light money.

Ecuadorian ships have been exempt as the result of a finding, based upon reciprocity, issued in 1944. By letter, dated January 12, 1988, the Department of State informed the U.S. Customs Service that the U.S. Embassy in Quito, Ecuador had reported it had been advised that U.S. vessels have been paying lighthouse fees in Ecuadorian ports since 1983. This is in violation of the requirement for reciprocal treatment, since Ecuadorian vessels were not being charged such fees at U.S. ports. Because of this lack of reciprocity, the Department of State recommended that Ecuador be removed from the list of nations whose vessels are exempted from payment of special tonnage taxes and light money. On February 4, 1988, the Director, Office of Regulations and Rulings of the U.S. Customs Ser-

vice determined that, as of that date, Ecuador should be deleted from the list in § 4.22.

By virtue of the authority vested in the President by Section 4228 of the revised statutes, as amended (116 U.S.C. 141), the President delegated the authority to grant the exemption from payment of special tonnage tax and light money to the Secretary of the Treasury by E.O. 10289, September 17, 1951, as amended by E.O. No. 10882, July 18, 1960 (3 CFR 1959–1960 Comp., Ch. II). By Treasury Department Order 165025, The Secretary of the Treasury delegated authority to the Commissioner of Customs to prescribe regulations relating to § 4.22 and other sections of the Customs Regulations relating to lists of countries entitled to preferential treatment in Customs matters because of reciprocal privileges accorded to vessels and aircraft of the U.S. Subsequently, by Customs Delegation Order No. 66 (T.D. 82–201), dated October 13, 1982, the Commissioner delegated authority to amend this section to the Assistant Commissioner (Commercial Operations), who redelegated this authority to the Director, Office Regulations and Rulings, who then redelegated it to the Chief, Regulations and Disclosure Law Branch.

FINDING

On the basis of the information received from the Department of State, as described above, it has been determined that the U.S. is in possession of satisfactory evidence regarding the assessment of lighthouse fees on U.S. vessels by the nation of Ecuador in violation of an agreement to the contrary. Therefore, Ecuador will be deleted from the list of nations whose vessels are exempted from the payment of the special tonnage tax and the payment of light money as of February 4, 1988.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this amendment merely implements a statutory requirement and involves a matter in which the majority of the public is not particularly interested, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary. Further, for the same reasons good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1).

THE REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). That Act does not apply to any regulation such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et.seq.*), or any other statute.

EXECUTIVE ORDER 12291

This amendment does not meet the criteria for a major regulation as defined in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs inspection and duties, Harbors, Vessels.

PART 4—VESSELS IN FOREIGN DOMESTIC TRADES

1. The general authority citation for Part 4 and the specific authority for § 4.22 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624, 46 U.S.C. 3, 2103.

§ 4.22 also issued under 46 U.S.C. 121, 181, 141.

§ 4.22 [Amended]

2. Section 4.22, Customs Regulations (19 CFR 4.22), is amended by deleting "Ecuador" from the list of nations entitled to exemptions from special tonnage taxes and light money.

Dated: March 14, 1988.

B. JAMES FRITZ,
Chief, Regulations and Disclosure Law Branch.

[Published in the Federal Register, March 22, 1988 (53 FR 9315)]

U.S. Court of Appeals for the Federal Circuit

(Appeal Nos. 87-1147, 87-1148, 87-1149, and 87-1160)

NATIONAL CORN GROWERS ASSOCIATION, NEW ENERGY CO. OF INDIANA, ARCHER DANIELS MIDLAND CO., OHIO FARM BUREAU FEDERATION, AND A.E. STALEY MANUFACTURING CO., PLAINTIFFS-CROSS-APPELLANTS *v.* JAMES BAKER III, SECRETARY, U.S. DEPARTMENT OF THE TREASURY, JOHN M. WALKER, JR., ASSISTANT SECRETARY, U.S. DEPARTMENT OF THE TREASURY, WILLIAM VON RAAB, COMMISSIONER OF CUSTOMS, U.S. CUSTOMS SERVICE, UNITED STATES OF AMERICA, CITICORP INTERNATIONAL CO., INC., AND RAJ CHEMICALS, INC., DEFENDANTS-APPELLANTS

Stephen L. Urbanczyk, of Williams & Connolly, Washington, D.C., argued for appellee National. With him on the brief were *Aubrey M. Daniel, III, Manley W. Roberts, Robert W. Hamilton*, and *William R. Murray, Jr.*

David M. Cohen, Director, of the Commercial Litigation Branch, Department of Justice, New York, New York, argued for appellant Baker. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office and *Kenneth N. Wolf*.

A. Douglas Melamed, of Wilmer, Cutler & Pickering, Washington, D.C., argued for appellant Citicorp. With him on the brief were *Robert C. Cassidy, Jr.* and *Deborah M. Levy*.

Joseph A. Artabane, of Spriggs, Bode & Hollingsworth, Washington, D.C., argued for appellant RAJ. With him on the brief were *William H. Bode, Mark J. Riedy* and *Joseph L. Nellis*.

Robert J. Leo, of New York, New York, was on the brief for Amicus Curiae, American Association of Exporters and Importers.

William F. Demarest, Jr., J. Peter Luedtke, and *Thomas C. Jones, Jr.*, of Holland & Hart, Washington, D.C., were on the brief for Amicus Curiae, Citgo Petroleum Corporation.

Appealed from: U.S. Court of International Trade.
Judge AQUILINO.

ORDER

Before BISSELL, *Circuit Judge*, NICHOLS, *Senior Circuit Judge*, and MAYER, *Circuit Judge*.

We are confronted with an unusual kind of post-opinion motion which complains of a wrong done in our opinion to counsel, not the party counsel represented. It says the court "chides" counsel, to the

injury of his standing and reputation, by imputing to counsel, and refuting, an argument counsel did not make.

Counsel should be assured, if this court intends to "chide" anyone, as for example for making a frivolous argument, we know how to do so in express language. If such language is not included in an opinion, no intent to "chide" is present and none should be inferred.

The matter here is one of semantics. Counsel certainly relied on the Administrative Procedures Act (APA), 5 U.S.C. § 702 and ff, to support the exercise of jurisdiction that occurred in the trial court, erroneous as we held and as the motion does not deny. Only, counsel say, they intended to rely on the APA, not as granting jurisdiction to the trial court all by itself, but as substantive law backing the trial court's exercise of jurisdiction under 28 U.S.C. § 1581(i). Since, either way, the argument was unsound, it is not a matter of much moment whether it was, actually, one or the other.

The motion is denied.

Dated: March 14, 1988.

BY THE COURT:
PHILIP NICHOLS, JR.,
Senior Circuit Judge.

MAYER, *Circuit Judge,* concurring.

The court's opinion on the merits states that National Corn Growers Association *et al.* argued that "the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* (APA), grants the Court of International Trade jurisdiction to review the Customs Service actions in question." Slip op. at 31 (Fed. Cir. Feb. 9, 1988). My review of the oral argument and briefs shows that National Corn Growers actually said that the Court of International Trade "properly exercised its jurisdiction under [28 U.S.C.] § 1581(i) to review [National Corn Growers'] cause of action under the APA." But I agree with the court that there is no need to change the opinion because of this semantical difference; the outcome remains the same and this order serves to confirm that no criticism of counsel was intended.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 88–24)

ROSES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, ASOCOLFLORES, ET AL., DEFENDANT-INTERVENORS

Court No. 84–10–01447

ROSES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, ASOCOLFLORES, ET AL., DEFENDANT-INTERVENORS

Court No. 84–10–01371

ROSES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, ASOCOLFLORES, ET AL., DEFENDANT-INTERVENORS

Court No. 84–08–01215

ROSES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, ASOCIACION NACIONAL DE PRODUCTORES Y EXPORTADORES DE ORNAMENTALES DE MEXICO A.C. (ANAPROMEX), DEFENDANT-INTERVENOR

Court No. 84–05–00632

ROSES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81–07–00857

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

Plaintiff moves for orders reassigning five actions from the assigned judge, and for orders setting aside the orders of dismissal of these actions for lack of prosecution issued by the assigned judge.

Held: Since the statutory authority of the chief judge to reassign a case should not be exercised after the assigned judge has rendered a final decision, the motions are denied.

[Plaintiff's motions denied.]

(Dated March 1, 1988)

Stewart and Stewart (Eugene L. Stewart), for the plaintiff.

James M. Spears, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch *(Shiela N. Ziff),* for defendant Department of Commerce, International Trade Administration.

Lyn M. Schlitt, General Counsel; *James A. Toupin,* Assistant General Counsel *(Judith M. Czako),* for defendant International Trade Commission.

Duncan, Allen and Mitchell (Leslie Alan Glick and *John P. Williams),* for defendant-intervenor Anapromex.

RE, *Chief Judge:* Plaintiff moves before the chief judge for reassignment of these five actions from the assigned judge, and also moves to set aside the orders of dismissal issued by the assigned judge. Since the chief judge concludes that the statutory authority to reassign a case should not be exercised after the assigned judge has rendered a final decision, the motions are denied.

BACKGROUND

Plaintiff, an association of domestic rose growers, instituted five separate actions challenging various antidumping and countervailing duty determinations by the Department of Commerce's International Trade Administration (ITA) and the International Trade Commission (ITC) pertaining to fresh cut roses imported from Colombia and Mexico. In 1981, plaintiff commenced court no. 81–07–00857, challenging the ITA's decision not to initiate an antidumping investigation as to imports from Colombia. The remaining four actions were commenced in 1984. In court no. 84–05–00632, plaintiff contested the ITA's final determination that Mexican producers of certain fresh cut flowers did not receive bounties or grants within the meaning of the countervailing duty law. In court nos. 84–08–01215 and 84–10–01447, plaintiff challenged certain aspects of the ITA's final determination of sales at less than fair value of imports from Colombia. In court no. 84–10–01371, plaintiff sought review of the ITC's final determination of no material injury to the domestic industry due to imports of fresh cut roses from Colombia.

Pursuant to the statutory authority of the chief judge to assign cases, 28 U.S.C. § 253(c), these five actions were assigned by the chief judge to a single judge.

On January 11, 1988, the assigned judge, *sua sponte,* and apparently without notice, dismissed all five actions for "lack of prosecution" pursuant to Rule 41(b)(2) of the Rules of the United States Court of International Trade. That rule, in pertinent part, provides:

(b) Involuntary Dismissal—Effect Thereof.

> (2) Whenever it appears that an action is not being prosecuted with due diligence, the court may upon its own initiative after notice, or upon motion of a defendant, order the action dismissed for lack of prosecution.

Rule 41(b) also provides that an involuntary dismissal, including those issued in these actions pursuant to paragraph (2), "operates as a dismissal upon the merits * * *." USCIT R. 41(b)(4).

Plaintiff's motions are before the chief judge to reassign on the ground that "special circumstances" surrounding these cases "warrant reassignment." It should be noted that throughout the motion papers of both plaintiff and the government defendants, the parties have misstated the authority under which the chief judge may reassign an action. Since it is clear that plaintiff's motions for reassignment were intended to be made pursuant to 28 U.S.C. § 253(c) and Rule 77(e)(4), they will be considered as made on the authority of those provisions.

Plaintiff asserts that the "special circumstances" which require the granting of these motions are the "delay in ruling upon pending motions and the unwarranted *sua sponte* dismissals of these actions," and concludes that the orders of dismissal "were issued in error * * *." Plaintiff also maintains that it is clear that the "procedural posture" of these cases reveals that there is no basis for their dismissal for "lack of prosecution."

In response to plaintiff's motions for reassignment, the defendant ITA opposes the motion to reassign court no. 81–01–00857, since the matter "involves no actual case or controversy and has long since been mooted." Defendant ITA has no objection to plaintiff's motion to set aside the dismissals of court nos. 84–10–01447, 84–08–01215, and 84–05–00632, and defers to the discretion of the chief judge.

In court no 84–10–01371, the defendant ITC takes no position on plaintiff's motion to reassign since that question is entrusted to the "sound discretion" of the chief judge. On plaintiff's motion to set aside the dismissal, defendant ITC supports plaintiff's position, and states that "the [c]ourt's order dismissing * * * [the] action for want of prosecution was based on a mistake." Defendant ITC does not indicate the nature of the "mistake."

Defendant-intervenor, Anapromex, in court no. 84–05–00632, opposes plaintiff's motions in that action to reassign and set aside the dismissal. Anapromex characterizes plaintiff's motion to reassign as an attempt to "move the case from a Judge from whom it has received an unfavorable result," and asserts that plaintiff has failed to set forth any "legal or factual basis that constitute[s] 'special circumstances' pursuant to Rule 77(e)(4) of this Court so as to allow reassignment." As to plaintiff's motion to set aside the *sua sponte* dismissal, Anapromex submits that the assigned judge acted properly in the exercise of judicial discretion in managing assigned cases.

Discussion

Plaintiff's motions present a significant question of first impression, and implicate considerations of judicial independence, as well as "the effective and expeditious administration of the business of the courts." In this case, the specific question presented is whether

the statutory authority conferred upon the chief judge of this court to reassign a case should be exercised after the judge to whom a case was assigned has taken judicial action by dismissing the case. Since the chief judge has decided that the discretionary authority to reassign a case should not be exercised as requested by plaintiff, the motions are denied.

The statutory authority of the chief judge to reassign a case from one judge to another is found in 28 U.S.C. § 253(c), which provides:

> The chief judge, under rules of the court, may designate any judge or judges of the court to try any case and, when the circumstances so warrant, reassign the case to another judge or judges.

28 U.S.C. § 253(c) (1982).

This statutory authority is implemented by Rule 77(e)(4) of the Rules of the Court of International Trade, which provides:

> *Reassignment.* An action may be reassigned by the chief judge upon the death, resignation, retirement, illness or disqualification of the judge to whom it was assigned, *or upon other special circumstances warranting reassignment.*

USCIT R. 77(e)(4) (Emphasis added).

As implemented by Rule 77(e)(4), the statutory authority of the chief judge to reassign a case to another judge may be exercised only "upon the death, resignation, retirement, illness or disqualification of the judge" to whom the case was assigned, or upon "other special circumstances" that would justify the reassignment.

Plaintiff's motions to reassign do not assert any of the reasons specified in Rule 77(e)(4) which describe situations in which the assigned judge is unable to perform judicial duties because of "death, resignation, retirement, illness or disqualification." Clearly, therefore, the chief judge may exercise the authority and discretion to reassign these cases only if there exist "other special circumstances warranting reassignment."

Since plaintiff does not allege any of the specific grounds set forth in the applicable rule pertaining to the inability of the assigned judge to perform judicial duties, its request for reassignment must be based on "other special circumstances warranting reassignment." The special circumstances stated by the plaintiff are "the inability to obtain rulings on a variety of motions" from the assigned judge, "the delay in ruling upon pending motions" by the assigned judge, and "the unwarranted *sua sponte* dismissals" for "lack of prosecution" by the assigned judge.

In essence, the ultimate relief requested by plaintiff in these motions is to have the chief judge review, as though on an appeal, final decisions of another judge of this court. The relief requested on that review is to have the final decisions set aside. It cannot be doubted that, regardless of the procedural methods used or the manner in

which plaintiff phrases its requested relief, plaintiff seeks a reversal of the dismissals by the assigned judge.

The fundamental question presented, therefore, is whether the statutory reassignment authority conferred upon the chief judge should be exercised to permit an intracourt appeal from the final decision of the assigned judge.

While not directly in point, the opinion in *National Corn Growers Ass'n* v. *Baker*, 10 CIT——, 643 F. Supp. 626 (1986), is instructive, and sheds light on the exercise of discretionary authority by the chief judge to reassign cases. In *National Corn Growers*, the defendant-intervenor moved before the chief judge for reassignment of that case to a three-judge panel to rehear the decision of a single-judge court. The chief judge concluded that reassignment to a three-judge panel would not "aid in the expeditious disposition of the action," and denied the motion for reassignment. *National Corn Growers*, 10 CIT——, 643 F. Supp. at 632.

As expressed in *National Corn Growers*, for reasons of judicial economy and efficiency, the statutory authority of the chief judge to reassign cases "should be used sparingly," and motions to reassign a case after it has been assigned to a judge will be viewed with disfavor. *Id.* at ——, 643 F. Supp. at 631. In *National Corn Growers*, it also was stated that "[m]otions for reassignment made after a single judge has rendered a decision face an even heavier burden. Certainly, the chief judge will not allow any party to engage in what may appear to be 'judge shopping.'" *Id.*

It is obvious that plaintiff is dissatisfied with the dismissals of its cases. Furthermore, plaintiff clearly believes, particularly under the circumstances presented, that it was unwarranted and unjustified for the assigned judge to dismiss these cases *sua sponte* for failure to prosecute. However, the question that must be answered is whether these motions to reassign and set aside the orders of dismissal are the proper procedural methods to achieve the ultimate relief sought by plaintiff. The chief judge has concluded that they are not, and that other remedies were and are available.

Plaintiff clearly chose not to submit to the assigned judge the motions to set aside the dismissals, pursuant to 28 U.S.C. § 2646 and USCIT Rules 59 and 60. Nevertheless, it could have filed appeals, pursuant to 28 U.S.C. § 1295(a)(5), from those final decisions to the Court of Appeals for the Federal Circuit. Plaintiff does not indicate why that appeal procedure was not followed.

Furthermore, if prior to the dismissals of these actions, plaintiff believed that it was aggrieved by its alleged "inability to obtain rulings" or a "delay in ruling" on motions pending before the assigned judge, it could have proceeded by petitioning for a writ of mandamus from the Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1651 and Rule 21 of the Federal Rules of Appellate Procedure. *See In re Toshiba*, Misc. Docket No. 151 (Fed. Cir. Feb. 26, 1987) (granting writ of mandamus directing this court to act upon a

pending application for preliminary injunction); *see also Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 666–67 (1978) ("Where a district court obstinately refuses to adjudicate a matter properly before it, a court of appeals may issue the writ [of mandamus] to correct 'unauthorized action of the district court obstructing the appeal.' "); *In re International Business Machs. Corp.*, 687 F.2d 591, 599 (2d Cir. 1982) (although mandamus cannot be utilized as substitute for appeal, it has been used to compel a lower court "to exercise its authority when it is its duty to do so.").

In sum, plaintiff was and is not remediless in this situation. There were and are appropriate judicial remedies available to the plaintiff other than the reassignment of these cases pursuant to the authority of the chief judge. Plaintiff's requests for reassignment, in effect, are appeals to the chief judge in the hope of setting aside or reversing what plaintiff characterizes as erroneous orders of dismissal.

In plaintiff's motion papers, no reason is given to explain why these other appropriate and available remedies were not pursued. In passing upon these contested motions to reassign, the chief judge must make a determination solely upon the facts and circumstances specified in the moving and responding papers. Furthermore, it is axiomatic that judicial acts, including the *sua sponte* dismissals of these cases, are *prima facie* entitled to the presumption that the assigned judge performed judicial duties in a regular and lawful manner.

Plaintiff's motion papers contain allusions and implications from which it might be inferred that the assigned judge, because of alleged delays in the disposition of pending motions, has not discharged, to plaintiff's satisfaction, that judge's judicial duties effectively and expeditiously. However, it is nonetheless clear that the statutory responsibility of the chief judge to reassign cases does not include the expressed or implied authority to permit intracourt appeals from the final decisions of another judge of this court. The statutory phrase "when the circumstances so warrant" and the language used in the applicable rule, "special circumstances warranting reassignment" cannot be interpreted to mean that the chief judge may reassign a case after it has been dismissed even if the chief judge is persuaded that the case should not have been dismissed.

For the chief judge to conclude that these cases were improperly dismissed would be to implicate the merits of the dismissals, and the performance of the judicial duties of another judge. Hence, the normal and proper procedure to be pursued by the aggrieved party to correct these alleged errors is an appeal to the appropriate appellate court. The independence of the assigned judge and proper judicial procedure militate against interpreting the statutory authority of the chief judge to include the reassignment of a case after it has been decided. The potential harm inherent in the discretionary ex-

ercise or misuse of that reassignment authority is a sufficient reason to conclude that it cannot be deemed to exist by inference or implication.

It is important to note that under the statutory system for the management of cases before the federal courts, only the judicial councils of the circuits have authority to "make all necessary and appropriate orders for the effective and expeditious administration of justice within" the circuits. *See* 28 U.S.C. § 332(d)(1) (1982); *See also Chandler* v. *Judicial Council of the Tenth Circuit,* 398 U.S. 74, 76 n.1 (1970).

That statutory grant of authority to the judicial councils was before the Supreme Court in the *Chandler* case. In the *Chandler* case, the Judicial Council of the Tenth Circuit, acting under the authority of section 332, made a finding that Judge Chandler was "unable, or unwilling, to discharge efficiently the duties of his office," and issued an order reassigning his pending cases, and prohibiting the assignment to him of any future cases. 398 U.S. at 77. Judge Chandler, a district court judge, challenged the authority of the Council to issue the order, and applied to the Supreme Court for the extraordinary writ of mandamus. Specifically, the judge contended that the Council "usurped the impeachment power, committed by the Constitution to the Congress exclusively." *Id.* at 82.

The Supreme Court did not entertain the judge's application for an extraordinary writ. Although the application was denied, the various judicial opinions in the case highlight the sharp differences of views on judicial independence, and the need for accountability to attain "the effective and expeditious administration of the business of the courts."

In delivering the opinion of the Supreme Court, that Judge Chandler had "not made out a case for the extraordinary relief of mandamus or prohibition," Chief Justice Burger wrote:

> Whether the action taken by the Council with respect to the division of business in Judge Chandler's district falls to one side or the other of the line defining the maximum permissible intervention consistent with the constitutional requirement of judicial independence is the ultimate question on which review is sought in the petition now before us. The dissenting view of this case seems to be that the action of the Judicial Council relating to assignment of cases is an impingement on judicial independence. There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business. The question is whether Congress can vest in the Judicial Council power to enforce reasonable standards as to when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine matters. As to these things—and

indeed an almost infinite variety of others of an administrative nature—can each judge be an absolute monarch and yet have a complex judicial system function efficiently?

Id. at 84–85. Chief Justice Burger added that:

> The legislative history of 28 U.S.C. § 332 and related statutes is clear that some management power was both needed and granted * * *.
>
> Many courts—including federal courts—have informal, unpublished rules which, for example, provide that when a judge has a given number of cases under submission, he will not be assigned more cases until opinions and orders issue on his "backlog." These are reasonable, proper, and necessary rules, and the need for enforcement cannot reasonably be doubted. These internal rules do not come to public notice simply because reasonable judges acknowledge their necessity and abide by their intent. But if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse.

Id. at 85 (footnote omitted).

In his concurring opinion in *Chandler,* Justice Harlan wrote that a judicial council's specific statutory authority to:

> "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit" was intended to encompass the making of orders that would direct a district judge to clear up his docket or would channel cases to other judges when a situation existed with respect to one judge that was inimical to the effective administration of justice.

Id. at 121 (Harlan, J., concurring). *But see id.* at 129 (Douglas, J., dissenting); *id.* at 141 (Black J., dissenting). *See generally* Re, *Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980,* 8 N. Ky. L. Rev. 221, 237–39 (1981).

It is important to note, however, that the Congress has not included this court within a judicial council. Hence, the judges of this court are not subject to any judicial council's statutory authority to issue orders necessary "for the effective and expeditious administration of the business" of the court. Furthermore, there is no statute that confers upon this court the authority conferred upon a judicial council under 28 U.S.C. § 332.

This is not to say that in the absence of specific statutory authority a chief judge has no authority to act in the court's case management system. Chief judges "have—and are perceived as having—a sizable reservoir of authority that is inherent in the office itself." R. Wheeler, *Desk Book for Chief Judges of United States District Courts* A–12 (Federal Judicial Center 1984).

It is for that reason that, as explained in the *Desk Book,* "the conventional and widely accepted view" is that a chief judge "is ultimately responsible for seeing that the court is administered in com-

pliance with statute, with Judicial Conference and circuit judicial council policies, and with Conference-approved Administrative Office regulation and, in a more general sense, is administered effectively and efficiently." *Id.* at A–9.

Included among a chief judge's "responsibilities and opportunities for effective leadership," described in the *Desk Book*, is the resolution of problems with a court's case assignment system. When a court's assignment system poses a threat to the court's "ability to serve litigants fairly" the problems may "call for intervention by the chief judge to resolve them." *Id.* at F–6. Indeed, this helpful desk book enumerates some of the responsibilities and prerogatives of the chief judge including the correcting of imbalances in case assignments, and the "shifting" of a case from one judge to another.

However, there is no inherent or implied authority in the case assignment responsibilities of a chief judge that permits interference with a judge's independence after that judge has decided a case.

This court may exercise other statutory powers of a judicial council only in the limited circumstances prescribed in 28 U.S.C. § 372(c)(17), when a written complaint is filed with the clerk of the court which alleges that a judge: (1) has engaged in conduct prejudicial to the effective and expeditious administration of the business of the court; or (2) is unable to discharge all the duties of office by reason of mental or physical disability. As required by section 372(c)(17), this court has prescribed appropriate rules for the implementation of this important legislation.

Nevertheless, in the absence of the statutorily authorized proceedings prescribed by section 372(c)(17), there is no statutory authority that authorizes either the chief judge of this court, or the court itself, to interfere with the independence of any judge in the performance of judicial duties by reassigning a case after the judge has rendered a final decision.

In conclusion, it is well to note that this decision does not preclude plaintiff from its desire to overturn these dismissals by using appropriate appellate procedures. Since it is apparent that plaintiff wishes judicial review of these dismissals by someone other than the assigned judge, pursuant to 28 U.S.C. § 1295(a)(5) plaintiff may pursue appeals from the dismissals to the Court of Appeals for the Federal Circuit.

Accordingly, for the reasons stated, it is

ORDERED that the motions for reassignment and rehearing are denied.

(Slip Op. 88–25)

WASHINGTON INTERNATIONAL INSURANCE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81–12–01678

Before RE, *Chief Judge.*

MEMORANDUM OPINION AND ORDER

[Defendant's motion to extend time is granted.]

(Dated March 1, 1988)

Wayne Jarvis, Ltd. (Wayne Jarvis) and *Tribbler & Marwedel (Paul McCambridge),* for the plaintiff.

James M. Spears, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*A. David Lafer* on the motion), for the defendant.

RE, *Chief Judge:* Defendant moves before the chief judge to extend the time to respond to plaintiff's motion for reassignment. This motion raises a question of first impression in this court pertaining to the interrelationship of Rules 6(a) and 6(c) of the Rules of the United States Court of International Trade, which regulate the method of computing time for responding to pleadings and motions.

On January 13, 1988, plaintiff served defendant by mail with a copy of a nondispositive motion before the chief judge to reassign this action from a three-judge panel to a single judge and to proceed with a jury trial. On February 3, 1988, defendant served plaintiff with a motion for an extension of time to respond to plaintiff's motion for reassignment. Defendant stated that it required additional time to obtain the Solicitor General's authorization before filing an interlocutory appeal, pursuant to 28 U.S.C. § 1292(d), from this court's order in *Washington Int'l Ins. Co.* v. *United States,* 12 ——, Slip Op. 88–4 (Jan. 12, 1988), denying the government's motion to strike plaintiff's demand for a jury trial.

Plaintiff opposed defendant's motion for an extention of time as being untimely served. Plaintiff maintains that since its motion for reassignment is nondispositive, pursuant to Rule 7(d) of the Rules of the United States Court of International Trade, defendant had 10 days from the date of service, January 13, 1988, to serve plaintiff with its response. Rule 7(d) provides that "[u]nless otherwise prescribed by these rules, or by order of the court, a response to a motion shall be served within 10 days after service of such motion * * *"

Plaintiff argues that, since its motion to reassign was served by mail, Rule 6(c) operates to increase defendant's time to respond by 5 days. In support of its argument, plaintiff maintains that in computing the due date for the service of defendant's response, the Rules do not permit the exclusion of Saturdays, Sundays, and legal holidays. Therefore, under plaintiff's formula defendant's due date

was January 28, 1988, that is 15 calendar days after the date of service of plaintiff's motion.

Plaintiff asserts that Rule 6(a) permits the exclusion of intermediate Saturdays, Sundays, and legal holidays in computing time only "when the period of time prescribed or allowed is less than *11* days." Plaintiff maintains that Rule 6(a) is inapplicable in this case "since Rules 7(d) and 6(c) collectively prescribe that the government be allowed *15* days." Hence, it is plaintiff's position that defendant's motion was served beyond the due date, and therefore, is untimely.

The specific question presented is whether a prescribed period of less than 11 days, which under USCIT Rule 6(a) excludes Saturdays, Sundays, and legal holidays, is, in effect, extended by USCIT Rule 6(c) by adding 5 days when service is made by mail. The court concludes that a party may avail itself of the benefits of both Rule 6(a), by excluding intervening Saturdays, Sundays, and legal holidays, and the benefits of Rule 6(c), by adding 5 days for service by mail, in calculating the due date of its response to a nondispositive motion.

Rule 6, in pertinent part, provides as follows:

> (a) Computation. In computing any period of time prescribed or allowed by these rules, by order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or a legal holiday, or when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk inaccessible, in which event the period runs until the end of the next day which is not one of the afore-mentioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.
>
> * * * * * * *
>
> (c) Additional Time After Service by Mail. Whenever a party has the right or obligation to do some act or take some proceeding within a prescribed period after the service of a pleading, motion, or other paper upon him, and the service is made by mail, 5 days shall be added to the prescribed period.

USCIT R. 6(a),(c).

Rules 6(a) and 6(c) of the Rules of the United States Court of International Trade are patterned after Rules 6(a) and 6(e) of the Federal Rules of Civil Procedure, respectively. The question of the interrelationship between Rules 6(a) and 6(e) of the Federal Rules of Civil Procedure was considered in a recent opinion by the United States Court of Appeals for the Ninth Circuit in *Tushner* v. *U.S. Dist. Court for Cent. Dist. of Cal.*, 829 F.2d 853 (9th Cir. 1987). In *Tushner,* then Circuit Judge Anthony Kennedy, now Associate Justice of the Supreme Court, concluded that "Rule 6(e) cannot be construed to render prescribed periods of less than eleven days ineligible for beneficial treatment under Rule 6(a)." *Id.* at 855 (citing

Nalty v. *Nalty Tree Farm*, 654 F. Supp. 1315 (S.D. Ala. 1987)). Accordingly, it was explained that the prescribed time period is computed by utilizing the following formula:

> [F]irst by applying the less-than-eleven-day provision of Rule 6(a), thereby excluding any intervening weekends and legal holidays. After this computation, three additional days are added for mail service under Rule 6(e).

Tushner, 829 F.2d at 855–56.

Applying the *Tushner* formula to the facts of this case, defendant's response to plaintiff's motion was due on February 2, 1988. Under these circumstances, defendant's motion for an extension of time was served 1 day late. It is noted, however, that in determining the scope and intent of the Rules of the United States Court of International Trade, Rule 1 provides that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." USCIT R. 1.

This is the first opinion of this court on the interrelationship between USCIT Rule 6(a) and Rule 6(c). In view of the circumstances presented, and because of the importance of the underlying substantive issue, namely, the right to trial by jury in an action against the United States for the recovery of customs duties, the court, pursuant to its discretionary authority under USCIT Rule 1, grants defendant's motion for an extension of time to respond to plaintiff's motion for reassignment of the action.

As indicated previously, defendant requested the extension of time to obtain the Solicitor General's authorization before filing an interlocutory appeal pursuant to 28 U.S.C. § 1292(d). Rule 10(b)(1) of the Rules of the United States Court of Appeals for the Federal Circuit provides that appeals pursuant to 28 U.S.C. § 1292(d) shall be governed by Federal Rules of Appellate Procedure 5(a), (b), and (c). Rule 5(a) of the Federal Rules of Appellate Procedure provides that the statement prescribed by 28 U.S.C. § 1292 may be included "at any time." It is noted that, on February 19, 1988, the defendant filed its motion to amend this court's order in *Washington Int'l Ins. Co.* v. *United States*, 12 CIT ——, Slip Op. 88–4 (Jan. 12, 1988), to include the prescribed statement permitting immediate appeal to the Court of Appeals for the Federal Circuit.

Accordingly, for the reasons stated, it is

ORDERED that defendant's motion for an extension of time is granted.

(Slip Op. 88–26)

LOTTO U.S.A., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85–9–01252

Before RESTANI, *Judge.*

(Dated March 1, 1988)

Stedina and Deem (Charles P. Deem) for plaintiff.

James M. Spears, Acting Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, *(Michael T. Ambrosino),* Civil Division, United States Department of Justice, for defendant.

OPINION

RESTANI, *Judge:* This matter is before the court on stipulated facts in lieu of trial. The court concludes that the parties wish the court to draw any necessary factual inferences from the stipulated facts and the three exhibits which are part of the stipulated record. One of the exhibits is a sample of the merchandise at issue, one right shoe labeled "Lotto International."

The issue before the court is whether a band of rubber, or rubber-like substance, which overlaps and joins the sole and upper together through vulcanization constitutes part of the upper where it overlaps and is bonded to the same. It it does, the shoe will be subject of American Selling Price (ASP) appraisement.[1] If not, it will be classified and appraised otherwise, at a lesser duty.

The merchandise at issue was imported in 1981. The parties are in agreement that this shoe will escape ASP appraisement pursuant to Item 700.60, Tariff Schedules of the United States (TSUS) (1980) only if the exterior surface of the upper is composed of over fifty percent leather. Apparently, various measurements reveal that if the portion of the band (foxing) covering the shoe above the point at which the upper is turned under to join the sole[2] is considered to be the exterior surface of the upper, the government's ASP appraisement will prevail.

Plaintiff's basic argument is that foxing is a specially recognized third primary shoe component and is not part of the upper or the sole. This is supported by citation to Item 700.53, TSUS (1980) which specifically calls for an exception to classification under that provision where the upper is overlapped by foxing.[3] If this reference to a third component helps plaintiff, it also hurts its cause, as no reference to foxing as a determinant for classification is found in Item 700.60. Merely because something can be described as overlapping something else, does not prevent it from becoming the exterior surface of the component overlapped.

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[1] *See, Samuel Brilliant* v. *United States,* 9 CIT 180 (1985) for an explanation of the history of this type of appraisement.

[2] In this case the measurement is actually made from the bottom of the insole.

[3] The parties are in agreement that the exception is intended to exclude "moccasin-like" shoes from classification under Item 700.53.

The court has examined the shoe. At the front of the shoe, the foxing looks very much like part of the upper. At the rear, it looks like part of the sole. In all probability the design is to enhance the appearance of a very sturdy, well cushioned heel and a durable toe piece. Examination of the interior of the shoe reveals, however, that the foxing does overlap both the upper and sole and forms part of the exterior surface of both. When attempting to classify such a shoe a reasonable and easily understood rule applying the statute seems the best approach. Making measurements based on the actual point where the upper joins the sole is one sensible approach.

With regard to application to this shoe, the language of the TSUS provision does not provide a clear answer as to classification. Plaintiff's interpretation of the TSUS provision has nothing to recommend it over the approach taken by the government; in such a situation the government's interpretation must prevail.

(Slip Op. 88–27)

NAKAJIMA ALL CO., LTD., AND NAKAJIMA U.S.A., INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, SMITH-CORONA CORP., AMICUS CURIAE

Court No. 88–02–00079

Before CARMAN, *Judge.*

[Plaintiffs' action for writ of mandamus continued; plaintiff's application to require defendant to respond to the complaint on an accelerated timetable and for a hearing on the merits is denied; and applicant-intervenor's motion to intervene continued and amicus curiae status granted.]

(Decided March 3, 1988)

McDermott, Will & Emery, (R. Sarah Compton and Kurt J. Olson, on the motions and the briefs; *Patrick J. Cumberland* on the briefs), for the plaintiffs.

Patton, Boggs & Blow, (Michael D. Esch, on the motions) of counsel for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*M. Martha Ries,* on the motions); and Office of the Chief Counsel for International Trade, U.S. Department of Commerce, (*Lisa B. Koteen,* on the motions of counsel) for the defendant.

Stewart and Stewart, (Eugene L. Stewart, Terence P. Stewart, and *James R. Cannon, Jr.*) for the amicus curiae.

MEMORANDUM OPINION AND ORDER

CARMAN, *Judge:* Plaintiffs filed their summons and complaint and moved for an order to show cause from this court seeking to expedite this action by shortening defendant's time to answer, accelerating discovery, and setting an early trial date for a trial on the merits. Plaintiffs' action prays for a writ of mandamus to be issued di-

recting the defendant, United States Department of Commerce, International Trade Administration (Commerce), to complete and publish various preliminary and final administrative § 751 review (751 review) results pursuant to § 751 of the Tariff Act of 1930, as amended by the Trade and Tariff Act of 1984, 19 U.S.C. § 1675 (1987) in Commerce's antidumping investigation of portable electric typewriters from Japan.

On the return date, February 11, 1988, in open court, the Court directed the defendant to propose a schedule as to when the various section 751 reviews would be completed, directed the parties to confer and submit to the Court a proposed stipulation of facts, and continued the hearing until February 19, 1988. Thereafter, the plaintiffs withdrew their motion for an accelerated discovery and a trial *de novo*. On February 19, 1988, in open court, the Court reserved its decision on plaintiffs' action for a writ of mandamus and continued the case with certain requirements. Decision to grant applicant-intervenor's motion to intervene was also reserved by the Court but the Court granted applicant-intervenor amicus curiae status.

Facts

Plaintiffs Nakajima All Co., Ltd. and Nakajima U.S.A., Inc. (plaintiffs) filed this action for a writ of mandamus directing Commerce to complete and publish four preliminary and final 751 administrative review results regarding Commerce's antidumping investigation of portable electric typewriters from Japan. Plaintiffs also filed a motion for an order to show cause why this action should not be expedited.

At issue are four annual 751 reviews of an antidumping investigation and order concerning portable electric typewriters (PETS) produced and exported from Japan. The antidumping order has been in effect since May of 1980. Commerce has conducted eight 751 reviews since the order, completing and publishing the preliminary and final results of only the first three. The 751 reviews at issue (the fourth, fifth, sixth and seventh) involve sales going back to 1982. The parties have submitted to the court a proposed stipulation of facts concerning the several 751 reviews at issue. These facts are substantially set forth as follows:

> Nakajima All Co., Ltd. is an exporter of PETS from Japan. Nakajima U.S.A., Inc. is the United States importer of PETS exported by Nakajima All Co., Ltd. from Japan.
>
> On May 9, 1980, Commerce published its notice of an antidumping order issued for portable electric typewriters from Japan. Plaintiffs' merchandise was subject to this order. *Portable Electric Typewriters From Japan; Antidumping Duty Order*, 45 Fed. Reg. 30618 (1980). Subsequent to this order, eight different 751 reviews (Q1 through Q8) have been conducted on the subject merchandise sold or entered into the U.S. covering time periods from January 4, 1980 to April 30, 1987. The only preliminary and final 751 review results to have been completed

and published up to the date of February 19, 1988 have been Q1, Q2 and Q3.[1]
These are not at issue in this action.

Commerce is still conducting the remaining 751 reviews (Q4, Q5, Q6, Q7 and Q8), and has not published or completed any of the preliminary or final results for these reviews as of February 19, 1988. For the sake of convenience, the following table sets out the relevant chronology of the 751 reviews:

DATES OF ACTIONS TAKEN

Review Period	Initiation of Admin. Review Published	Latest Nakajima Data Submitted to Commerce	Preliminary Results Published	Final Results Published
1/4/80–4/30/80				
Q1	Unknown	N/A	4/24/81	8/2/82.
5/1/80–4/30/81				
Q2	8/2/82	N/A	10/5/82	9/9/83.
5/1/81–4/30/82				
Q3	1/83	N/A	7/1/86	1/14/87.
5/1/82–4/30/83				
Q4	4/18/83	4/30/87	None	None.
5/1/83–4/30/84				
Q5	6/22/84	4/30/87	None	None.
5/1/84–4/30/85				
Q6	7/9/86	4/30/87	None	None.
5/1/85–4/30/86				
Q7	6/23/86	4/30/87	None	None.
5/1/86–4/30/87				
Q8	6/19/87	11/13/87	None	None.

Plaintiffs' exhibit #1, *Nakajima All,* Court No. 88–02–00079.

The fourth 751 review, Q4, covers the time period May 1982 through April 1983 and was initiated by sending a questionnaire to plaintiffs on April 18, 1983. Commerce indicated the final results of this review would be issued on July 31, 1987. *Initiation of Antidumping Duty Administrative Reviews,* 51 Fed. Reg. 24883 (1986).

The fifth 751 review, (Q5), covered the time period May 1983 through April 1984 and was initiated by Commerce sending a questionnaire to plaintiffs on June 22, 1984. This review was

[1] As stipulated by the parties, the following constitutes the relevant chronology of events involving these three 751 reviews:

Q1—Commerce published its intent to initiate review of the antidumping order for the subject merchandise on March 16, 1981. *Intent to Conduct Administrative Review of Certain Antidumping Findings and Orders and Countervailing Duty Orders,* 46 Fed. Reg. 16921 (1981). The preliminary results of the first 751 review, covering the time period January 4, 1980 through April 30, 1980, were published on April 24, 1981. *Portable Electric Typewriters From Japan; Preliminary Results of Administrative Review of Antidumping Duty Order,* 46 Fed. Reg. 23278 (1981). The final results were published on August 2, 1982. *Portable Electric Typewriters From Japan; Final Results of Administrative Review of Antidumping Duty Order,* 47 Fed. Reg. 33306 (1982).

Q2—The second 751 review covering the time period May 1, 1980 through April 30, 1981, was initiated on August 2, 1982. *Id.* The preliminary results were published on October 5, 1982. *Portable Electric Typewriters From Japan; Preliminary Results of Administrative Review of Antidumping Duty Order,* 47 Fed. Reg. 43662 (1982). The final results were published on September 9, 1983. *Portable Electric Typewriters From Japan; Final Results of Administrative Review of Antidumping Duty Order,* 48 Fed. Reg. 40761 (1983).

Q3—The third 751 review was initiated no later than January of 1983 and covered the time period May 1981 through April 1982. The preliminary results were published on July 1, 1986. *Portable Electric Typewriters From Japan; Preliminary Results of Antidumping Duty Administrative Review,* 51 Fed. Reg. 23804 (1986). The final results were published on January 14, 1987. *Portable Electric Typewriters From Japan; Final Results of Antidumping Duty Administrative Review,* 52 Fed. Reg. 1504 (1987).

reinitiated on July 9, 1986. *Id.* Commerce stated the final results would be issued on July 31, 1987. *Id.*

The sixth administrative review, (Q6), covered the time period May 1984 through April 1985 and was initiated on July 9, 1986. *Id.* Commerce stated the final results would be issued on July 31, 1987. *Id.*

The seventh administrative review, (Q7), covered the time period May 1985 through April 1986, and was initiated on June 23, 1986. *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 51 Fed. Reg. 22843 (1986). Commerce stated that it would issue the final results of this review by June 20, 1987. *Id.*

On December 12, 1986, Commerce requested supplemental sales and cost of production information from plaintiffs for Q4, Q5, Q6 and Q7. On January 9, 1987, plaintiffs submitted to Commerce the requested supplemental questionnaire responses for Q4, Q5, Q6 and Q7. On February 2, 1987 Commerce requested additional supplemental information from plaintiffs regarding sales responses filed in 1983 and 1984 for Q4 and Q5. Plaintiffs submitted this information on February 17, 1987.

Commerce last sought information from plaintiffs with regard to the pending 751 reviews in March of 1987. Thereafter, plaintiffs submitted the requested information on April 30, 1987. Plaintiffs' merchandise at issue has been subjected to a 16.40% cash deposit rate since January 14, 1987.

The eighth administrative review, (Q8), covered the time period May 1986 through April 1987 and was initiated on June 19, 1987. *Initiation of Antidumping and Countervailing Duty Administrative Reviews; Construction Castings From Brazil etc.,* 52 Fed. Reg. 23330 (1987).

On July 17, 1987, plaintiffs advised Commerce of a clerical error regarding a difference in merchandise adjustment. Commerce, since the initiation of the original antidumping investigation, has conducted separate reviews for individual or several respondents.

At the first hearing, held in open court on February 10, 1988, defendant asserted Commerce would be completing the preliminary results for Q4, Q5, Q6, and Q7 by the end of March, 1988. Defendant also asserted Commerce intended to complete the final results for Q4, Q5, Q6 and Q7 by the end of June 1988. After all parties and *amicus curiae* had given their arguments, the Court directed the parties to stipulate as to the relevant facts of the case and submit a copy of the same to the Court. Any facts in dispute, the Court continued, should be submitted separately by each party. *Amicus curiae* was given leave to participate in such submissions. The Court also requested defendant to submit a proposed schedule to the Court as to when Commerce expected to complete and publish the preliminary and final results of the subject reviews (Q4–Q7).

The Court also reserved decision on applicant-intervenor's motion to intervene and the Court granted applicant-intervenor *amicus curiae* status in the case.

The Court continued the action until February 19, 1988, when all participants were directed to appear in open court. Plaintiffs thereafter withdrew their application to expedite discovery and for a trial on the merits.

On February 19, 1988, the parties submitted their proposed stipulation of facts. Defendant also submitted "Second Declaration of Timothy N. Bergen" to the Court. The declaration was that of the Director of the Office of Compliance of the International Trade Administration, Commerce, setting forth the proposed schedule for the completion of the subject 751 reviews. Mr. Bergen averred the preliminary results of the reviews at issue (Q4–Q7) would be completed by April 29, 1988. Mr. Bergen's declaration also set forth a report on the current status of the 751 reviews.

In open court on February 19, 1988, further argument by the parties was heard by the Court. It appears that concerning the 751 reviews in question (Q4–Q7) there are some factual issues and information encountered by Commerce that are germane to all these reviews and have been considered for all the reviews (Q4–Q7). Other issues and information considered in these reviews are applicable only to each separate review, especially regarding the comparison of models of the subject merchandise.

After all arguments were heard, the Court held it had jurisdiction in this matter and directed Commerce to accelerate, if possible, its schedule in completing the reviews, but to conduct their investigations with its usual level of competency and thoroughness. The Court also reserved its decision on plaintiffs' request for a writ of mandamus and continued the action. The parties were directed to submit bi-monthly reports and to appear in open court every month until the completion of the subject 751 reviews. The Court also reserved its decision on applicant-intervenor's motion to intervene and continued applicant-intervenor's *amicus curiae* status.

DISCUSSION

Plaintiffs have filed their complaint seeking a writ of mandamus directing Commerce to complete and publish the preliminary and final 751 review results concerning Japanese portable electric typewriters. Plaintiffs bring their action pursuant to the All Writs Act, 28 U.S.C. § 1651(a) and section 10(e)(1) of the Administrative Procedure Act, 5 U.S.C. § 706(1) and claim the Court has exclusive jurisdiction over this action pursuant to 28 U.S.C. § 1581(i).

Defendants argue plaintiffs' action is reviewable under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), therefore resort to jurisdiction under section 1581(i) is impermissible as set forth in case law and the statutes. Defendants state that because plaintiffs' jurisdictional status lies under section 1516a and 1581(c), these provisions "represent the exclusive means" by which plaintiffs must challenge Commerce's actions. Defendant further articulates that although § 1581(i) jurisdiction can be invoked in a situation where the reme-

dy provided for under § 1581(c) would be "manifestly inadequate," citing *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), plaintiffs have failed to demonstrate such showing here.

The general jurisdiction of this Court lies under 28 U.S.C. § 1581, and the Court has exclusive jurisdiction over specific types of civil actions pursuant to § 1581 subsections (a)–(h). *Miller & Co.* v. *United States*, 824 F.2d 961 (Fed. Cir. 1987). Concerning these specific jurisdictional grounds, it has been observed:

> [W]here Congress has prescribed in great detail a particular track for a claimant to follow, in administrative or judicial proceedings, and particularly where the claim is against the United States or its officials in their official capacity, the remedy will be construed as exclusive without a specific statement to that effect.

National Corn Growers Association v. *James Baker*, Nos. 87–1147, 87–1148, 87–1149, and 87–1160, Slip Op. at 28 (Fed. Cir. Feb. 9, 1988).

Section 1581(i)[2] has been recognized as the "residual jurisdiction" subsection. It "may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co.*, 824 F.2d at 963. In situations where a cause of action might arise where the contested agency decision occurs between the final administrative determination and the administrative 751 review, a claimant may be able to file its action under the court's broad residual jurisdiction under § 1581(i). *UST. Inc.* v. *United States*, —— CIT ——, ——, 648 F. Supp. 1, 4 (1986); *aff'd on other grounds*, 831 F.2d 1028 (Fed. Cir. 1987); *Ceramica Regiomontana, S.A.* v. *United States*, 5 CIT 23, 27–28, 557 F. Supp. 596, 600 (1983). More relevant to the point, it has been held this Court has jurisdiction, under § 1581(i), to hear a cause of action arising from Commerce's *extended* delays in completing and publishing its 751 review results after it has published its initiation of the review. *UST, Inc.*, —— CIT at ——, 648 F. Supp. at 4.

In the present action, defendant claims this action is reviewable under 19 U.S.C. 1516a and 28 U.S.C. 1581(c). But, as plaintiffs aptly point out, the necessary prerequisite to the initiation of an action under these sections is the issuance of a final determination. The instant case does not contain such circumstances. As clearly evinced in the facts above, the challenged agency action (or lack of

[2] Section 1581(i) provides as follows:

(1) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;
(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i) (1986).

action) is the undue delays Commerce has experienced between its initiation of the subject 751 reviews, and the completion and publication of the preliminary and final results of those reviews. Such challenged actions are not provided for under § 1516a and § 1581(c) or any other subsection of 1581. Since Commerce's challenged action lies "outside the scope of any administrative proceeding which ultimately would result in a determination reviewable under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), obviously this is the circumstance in which Congress intended that the Court's residual jurisdiction could be invoked."[3] *Ceramica Regiomontana, S.A.* v. *United States*, 5 CIT 23, 26, 557 F. Supp. 596, 600 (1983).

In situations where judicial action is needed as a remedy to enforce or encourage compliance with statutory deadlines, i.e., where Commerce exceeds the publication deadline in its review proceedings pursuant to 19 U.S.C. § 1675, such remedy is available by virtue of this Court's jurisdiction under § 1581(i). *American Permac, Inc.* v. *United States*, —— CIT ——, ——, 642 F. Supp. 1187, 1192 (1986). It is clear the Court may exercise its jurisdictional powers over this action pursuant to 28 U.S.C. § 1581(i). *See, UST, Inc.*, —— CIT ——, 648 F. Supp. 1. Accordingly, this Court need not address the jurisdictional claims postulated by plaintiffs under 28 U.S.C. § 1651, the All Writs Act.[4] The Court observes, nevertheless, the All Write Act is in aid of jurisdiction but does not confer jurisdiction independently. The Court may employ the remedies under this Act in

[3] The Court of Customs and Patent Appeals commented on § 1581(i) in light of the congressional history:

> [W]e agree with the Court of International Trade that section 516a is not the "*exclusive* remedy for all grievances arising from the administration of the antidumping law." A possible conflict between sections 1581(i) and 516a was foreseen by Congress and specifically addressed:
>
> > This section [1581(i)] granted the court jurisdiction over those civil actions which arise directly out of an import transaction and involve one of the many international trade laws. The purpose of this section was to eliminate the confusion which currently exists as to the demarcation between the jurisdiction of the federal district courts and the Court of International Trade. This language made it clear that all suits of this type are properly commenced only in the Court of International Trade and not in a district court. This language made it clear that all suits of this type are properly commenced only in the Court of International Trade and not in a district court. Thus, the Committee did not intend to create any new causes of action, but merely to designate definitively the appropriate forum.
> >
> > * * * * * * *
> >
> > Subsection (i) is intended only to confer subject matter jurisdiction upon the court, and not to create any new causes of action not founded on other provisions of law.
> >
> > * * * * * * *
> >
> > As in the case of subsection (a) of proposed 1581, it is the intent of the Committee that the Court of International Trade not permit subsection (i), and in particular paragraph (4), to be utilized to circumvent the exclusive method of judicial review of those antidumping and countervailing duty determinations listed in section 516A of the Tariff Act of 1930 (19 U.S.C. § 1516a), as provided in that section. Since subsection (i) merely confers jurisdiction on the court and does not create any new causes of action, H.R. 7540 does not change the rights of judicial review which exist under section 516A.
> >
> > * * * * * * *
> >
> > *However, subsection (i), and in particular paragraph (4), makes it clear that the court is not prohibited from entertaining a civil action relating to an antidumping or countervailing duty proceeding so long as the action does not involve a challenge to a determination specified in section 516A of the Tariff Act of 1930.* [*Emphasis supplied.*]
>
> It is apparent from this legislative history that Congress envisioned occasions when an aspect of an antidumping duty determination might fall within the court's jurisdiction under section 1581(i). The Customs Regulations indicate that the contents of an antidumping duty determination are multifaceted and that the "factual findings and legal conclusions upon which the determination is based" comprise only one aspect of the determination. Thus, unless there is an express factual finding or legal conclusion which respect to the scope of the antidumping duty order ("description of the merchandise involved"), section 516a would not preclude an action based on section 1581(i).

Royal Business Machines, Inc. v. *United states*, 69 CCPA 61, 73–74, 669 F.2d 692, 701–702 (1982) (footnotes omitted).

[4] Interestingly, defendant does not dispute this Court would have jurisdiction to compel agency action that has been unreasonably delayed under the All Writs Act, as long as an independent source of the Court's jurisdiction exists, but interjects the present delays in the completion and publication of the preliminary and final results of the subject 751 administrative reviews have been justified and not unreasonable. Although this Court reserves such decision, it has been noted by both this Court and the Court of Appeals for the Federal Circuit that delays less lengthy than those at issue have been a source of serious concern. *See, UST, Inc.* v. *United States*, 831 F.2d 1039 (Fed Cir. 1987); *UST, Inc.* v. *United States*, —— CIT ——, ——, 648 F. Supp. 1, 6 (1986).

aid of its equity power, but only when an independent source of jurisdiction exists.

Concerning plaintiff's request for a writ of mandamus, the Court recognizes this is "an extraordinary equitable remedy which should be employed to compel the performance of a ministerial duty specifically enjoined by law where performance has been refused, and no meaningful alternative remed[y] exist[s]." *Id.* at —— CIT ——, 648 F. Supp. at 5.

Defendant maintains the issuance of a writ of mandamus compelling Commerce to complete and publish the overdue preliminary results and administrative 751 reviews prior to their completion is unwarranted and would be an interference of this Court in the agency's exercise of its discretionary duties in conducting and finalizing the results of administrative reviews. Defendant cites *Phillip Brothers* v. *United States*, —— CIT ——, 630 F. Supp. 1317 (1986), as supporting its proposition "the time stated [12 months] in 19 U.S.C. § 1675(a) is directory and not mandatory, and the failure to complete a review on time does not invalidate the review process." Defendant's Memorandum in Response to Plaintiffs' Order to Show Cause and in Support of Defendant's Motion to Dismiss at 25, *Nakajima All Co., Ltd.* v. *United States*, Court No. 88–02–00079.[5] Defendant also contends plaintiffs have not demonstrated good cause to justify the issuance of a writ of mandamus and compel the expedition of this case.

As mentioned above, the Court recognizes the concern it has for the questionable delays experienced by defendant in attempting to complete its administrative 751 reviews. The Court is cognizant these seemingly unexplained delays are a source of frustration, uncertainty, and expenditure of resources for plaintiffs. The Court alo recognizes the need for Commerce to arrive at its determinations with the degree of thoroughness and competency expected of that agency. While the agency does not have discretionary power in the administration of its procedures, Commerce may not dictate an ar-

[5] Although reserved for decision, this Court notes *Phillips* addressed a plaintiff's argument that:

> the merchandise at issue should [have been] liquidated by operation of law [19 U.S.C. § 1504(a) (1982 & Supp. 1986)] at the rate [claimed] by plaintiff when it was entered because Customs failed to complete the annual review within the statutory deadline of twelve months. * * * [A]lthough the liquidation in this case was originally suspended for the period review, * * * [plaintiff argued] the suspension automatically terminated at the end of the twelve-month period allowed for the review. Once a suspension terminates, an entry is liquidated within ninety days."

Phillips Bros., Inc. v. *United states*, —— CIT ——, ——, 630 F. Supp. 1317, 1322 (1986), *appeal dismissed*, No. 86–1122 (Fed. Cir. July 18, 1986). The Court went on to state:

> In several other contexts courts have recognized that statutory time period are directory, as opposed to mandatory, when no restraint is affirmatively imposed on the doing of the act after the time specified and no adverse consequences are imposed for the delay.
>
> * * * * * *
>
> As discussed above, the statute [§ 1504] in question in this case does not purport to restrain ITA from acting after the twelve-month period has passed. The more problematic issue is whether the statute imposes the adverse consequence for the delay, which plaintiff seeks to have imposed on ITA. The Court of Appeals for the Federal Circuit has noted "that both § 1504 and the provisions respecting countervailing duties, such as § 1675(a), were enacted as in *pari materia*, both being amendments to * * * the Tariff Act of 1930, and therefore a legislative intent to have them work harmoniously together, and for neither to frustrate the other * * * is very much to be inferred." *Florsheim*, 748 F.2d at 1566 (discussing 19 U.S.C. §§ 1504 and 1675(a)). Although these two provisions are to be read in tandem, and the suspension is to be implied, there is nothing in the statute or legislative history that compels the conclusion that the implied suspension automatically terminates at the close of the twelve-month period specified in section 751. Thus, in this situation, the court is unable to conclude that the statute imposes a penalty of deemed liquidation for the delay. Although ITA's failure to comply with the statutory time limit is not condoned by this court, this failure to act in a timely manner did not deprive ITA of jurisdiction to complete the section 751 review.

Id. at —— CIT ——, 630 F. Supp. at 1323–1324. It appears the relevant language in *Phillips* does not necessarily support defendant's proposition.

bitrary time schedule contrary to the intent of Congress to have these reviews proceed with expedition. A reasonable time schedule must be employed in these instances. Mandamus is an extraordinary remedy used when no meaningful alternative is available. Since defendant has indicated to the Court it will complete the outstanding 751 reviews with alacrity, it does not appear to the Court that it is necessary to issue a writ of mandamus at this time. The Court, therefore, reserves its decision on whether or not to issue a writ of mandamus, denies plaintiffs' application to require defendant to respond to the complaint on an accelerated timetable and for a hearing on the merits, and orders this action shall be continued until such time as the necessary procedures to complete the reviews have been followed. The Court directs that the parties comply with the following schedule:

(1) Defendant agrees and indicates it can complete its preliminary administrative review results for Q4–Q7 by April 29, 1988, pursuant to the declaration of Commerce's Director of Office Compliance for Import Administration, filed February 19, 1988, with this Court. If any difficulty is experienced by defendant in meeting this deadline, defendant shall immediately contact and inform this Court and the parties involved.

(2) All parties shall render a status report, concerning the progress of the 751 reviews, to the Court on February 29, 1988 and then render additional reports every two weeks following the first report until the resolution of this action. *Amicus curiae* may also participate and submit its report.

(3) Respective parties shall exchange copies of the above status reports at least 24 hours in advance of filing with the Court. The Court encourages the submission of a jointly filed consensual status report.

(4) All parties shall appear in open court at the United States Court of International Trade, in New York City, every thirty days, beginning and including March 25, 1988 at 10:30 a.m. to report to this Court the status of the action at bar.

(5) Commerce is directed to make every effort to accelerate, within reasonable bounds, its time frame in completing the preliminary and final results of its administrative 751 reviews, exercising Commerce's usual thoroughness and competency.

Concerning applicant-intervenor's motion to intervene, it is within the discretionary powers of this Court, pursuant to rule 24(b) of the Rules of this Court, to reserve decision on this motion and to grant applicant-intervenor *amicus curiae* status in this action.

This Court's order will be entered accordingly.

(Slip Op. 88–28)

PACIFIC TRAIL SPORTSWEAR, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86–09–01172

Before DICARLO, *Judge.*

Birch colored ski jackets are properly classified under item 376.56 of the Tariff Schedules of the United States.
[Judgement for plaintiff.]

(Decided March 1, 1988)
(Issued for publication March 7, 1988)

Rode & Qualey (Michael S. O'Rourke) for plaintiff.
James M. Spears, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Department of Justice *(Barbara M. Epstein),* for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of birch colored ski jackets, entered July, 1985, as "[o]ther men's or boy's wearing apparel, not ornamented: [o]f manmade fibers: [n]ot knit: [o]ther: [c]oats * * * [o]ther," under item 379.95, Tariff Schedules of the United States (TSUS), asserting that the ski jackets are properly classifiable as "[g]arments designed for rainwear, hunting, fishing, or similar uses, wholly or almost wholly of fabrics which are coated or filled, or laminated, with rubber or plastics, which (after applying headnote 5 of schedule 3) are regarded as textile materials: * * * [o]ther," under item 376.56, TSUS. The Court has jurisdiction under 28 U.S.C. § 1581(a) (1982) and holds in favor of plaintiff.

In *Pacific Trail Sportwear* v. *United States,* 12 CIT ——, Slip Op. 88–2 (Jan. 8, 1988), the Court denied motions for summary judgment made by plaintiff and defendant, finding a trial necessary to answer the factual question of whether the coating visibly affects the surface of the ski jackets within the meaning of headnote 2(a) of Schedule 3, part 4, subpart C, TSUS.

Based upon the exhibits and testimony presented at trial, the Court made a factual determination that samples of coated fabric found to be identical to that used to make the birch colored ski jackets appeared stiffer and did not drape as much as samples of the uncoated fabric.

In *Rosenthal Co.* v. *United States,* 81 Cust. Ct. 77, C.D. 4769, 460 F. Supp. 1246 (1978) *aff'd,* 67 CCPA 8, C.A.D. 1236, 609 F.2d 999 (1979), the trial court held that under headnote 2(a), the effect imparted by the coating to the fabric, and not the coating itself, must be visible. Noting that the fabric before it had the "appearance of stiffness," the trial court found the fabric to be "coated within the purview of the controlling headnote." *Id.*, 81 Cust. Ct. at 80, 460 F. Supp. at 1248.

Since the Court finds the coating on the birch colored ski jackets has an appearance of stiffness, the presumption of correctness that attaches to Customs' classification has been rebutted. The coating visibly affects the surface of the jackets within the meaning of headnote 2(a).

The Court holds that the birch colored ski jackets are properly classified under item 376.56, TSUS, as claimed by plaintiff. Judgment will be entered accordingly. So ORDERED.

(Slip Op. 88–29)

SYVA CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86–04–00476

Before TSOUCALAS, *Judge.*

[Defendant's motion to dismiss granted; action dismissed.]

(Decided March 8, 1988)

Adduci, Dinan, Mastriani, Meeks & Schill, (Jeffrey A. Meeks and *Ralph H. Sheppard)* for the plaintiff.

James M. Spears, Acting Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*Michael P. Maxwell*) for the defendant.

MEMORANDUM OPINION AND ORDER

TSOUCALAS, *Judge:* The central issue in this matter is whether plaintiff's failure to remit interest, which had accrued upon unpaid liquidated duties, constitutes a jurisdictional defect in that "all charges and exactions" were not paid before plaintiff commenced this action. The Court concludes that such an omission is fatal and thus, does not have jurisdiction over this action.

BACKGROUND

The subject goods were entered in May 1984, and plaintiff claimed duty free treatment under item 800.00, TSUS, as American goods returned. However, Customs rejected that claim and liquidated the entry at the applicable duty rate on December 28, 1984. In January 1986, plaintiff paid $9,113.21, reflecting the liquidated duties assessed, and thereafter initiated this action to contest Customs' refusal to accord a duty allowance for the imported merchandise. However, on November 29, 1984, one month before the liquidation, 19 U.S.C. § 1505(c) became effective. This amendment prescribes the time when liquidated duties are due and provides that duties considered delinquent will bear interest from the 15th day after liquidation. *See* 19 U.S.C. § 1505(c) (Supp. II 1984). Prior to this revision, no interest was assessed for late payment.

Plaintiff has not remitted $1,137.52 in accrued interest assessed on the delinquent payment of liquidated duties. It is alleged that plaintiff relied on information from a Customs official, who advised plaintiff that the new § 1505(c) would only be enforced for new entries and no enforcement action would be taken on existing entries. Defendant alleges, and plaintiff has not refuted, that plaintiff was on notice of the outstanding interest owing as reflected in past due bills sent by Customs to plaintiff. Defendant has moved to dismiss the action for lack of jurisdiction pursuant to USCIT R. 12(b)(1).

Discussion

Before commencing its analysis of the jurisdictional prerequisites, the Court deems it appropriate to briefly discuss two relevant issues. The first pertains to defendant's failure to timely answer the complaint despite extensions of time. Therefore, on March 30, 1987, default was entered against defendant in accordance with plaintiff's application pursuant to USCIT R. 55(a). Plaintiff thus sought default judgment from the court. Concurrent with its opposition to that application, with leave of the court, the government filed a motion to dismiss for lack of jurisdiction. Plaintiff subsequently moved for judgment on the pleadings.

The Court decided to enter default judgment against the government in accordance with USCIT R. 55(e), which dictates that:

> No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

In the absence of cases applying USCIT R. 55(e), it is relevant to refer to those cases construing Fed. R. Civ. P. 55(e) which is identical in language to our rule. Consistently it has been held that default judgment against the government cannot be granted based simply on the failure to file within a prescribed deadline. *Mason* v. *Lister,* 562 F.2d 343 (5th Cir. 1977); *Fedor* v. *Ribicoff,* 211 F. Supp. 520 (E.D. Pa. 1962); *accord United States* v. *Zulli,* 418 F. Supp. 252, 253 (E.D. Pa. 1975). It is essential that plaintiff establish its right to relief by satisfactory evidence before default judgment may be entered against the government. *See e.g., Poe* v. *Mathews,* 572 F.2d 137, 138 (6th Cir. 1978). In light of the government's motion to dismiss for lack of jurisdiction, it is clear that plaintiff has not overcome this hurdle and, therefore, the Court set aside the entry of default.

The second preliminary matter involves defendant's motion to dismiss out of time. Plaintiff had urged this Court to exercise its discretion to strike some or all of the late pleadings by defendant as out of time, in order to reach a just decision on the merits. Nonetheless, the Court is cognizant of the dictates of USCIT R. 12(h)(3) which permits a jurisdictional question to be raised at any time and requires the Court to dismiss the action if such a defect exists.

"[Q]uestions of jurisdiction may be raised at any time 'for clearly a decision of a court without jurisdiction is a nullity.'" *Glamorise Foundations, Inc.* v. *United States,* 11 CIT ——, ——, 661 F. Supp. 630, 633 (1987) (quoting *BASF Colors & Chemicals, Inc.* v. *United States,* 57 Cust. Ct. 541, 543, R.D. 11195 (1966), *aff'd* 59 Cust. Ct. 834, A.R.D. 228 (1967), *aff'd* 56 CCPA 47, C.A.D. 952, 420 F.2d 763 (1969)).

Therefore, in fulfilling its inherent duty to determine the jurisdictional propriety of the action, pursuant to USCIT R. 12(h)(3), the Court must address defendant's motion to dismiss before any disposition on the merits. *See e.g., Bethlehem Steel Corp.* v. *United States,* 6 CIT 164, 165, 571 F. Supp. 1265, 1266–67 (1983); *Feudor, Inc.* v. *United States,* 79 Cust. Ct. 179, 181, C.R.D. 77–13, 442 F. Supp. 544, 546 (1977) (on a motion to dismiss for lack of jurisdiction, it is inappropriate to resolve an inquiry addressed to the merits of the action).

The government's motion to dismiss is premised on the failure of plaintiff to satisfy the requirements of 28 U.S.C. § 2637(a) (1982), which sets forth that an action may be commenced in this court only if "all liquidated duties, charges, or exactions have been paid at the time the action is commenced." It is well settled that this court's jurisdiction to entertain a challenge such as plaintiff's (under 28 U.S.C. § 1581(a)) is conditioned upon the payment of liquidated duties, charges, and exactions. *United States* v. *Boe,* 64 CCPA 11, 18, C.A.D. 1177, 543 F.2d 151, 156 (1976); *American Air Parcel Forwarding Co., Ltd.* v. *United States,* 6 CIT 146, 150, 573 F. Supp. 117, 120 (1983). The terms conferring jurisdiction are mandatory and the statute does not afford an opportunity to exercise discretion in this matter. *Boe,* 64 CCPA at 16, 543 F.2d at 155; *see NEC Corp.* v. *United States,* 806 F.2d 247, 249 (Fed. Cir. 1986).

The question as to whether this jurisdictional hurdle was satisfied arises as a result of the 1984 enactment of subsection (c) to 19 U.S.C. § 1505, which provides:

> Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or reliquidation * * *.

Pub. L. 98–573, Title II, § 210(a), 98 Stat. 2977 (1984).

As the liquidated duties were paid more than one year after liquidation, interest had accrued. The Court will first dispose of defendant's argument that plaintiff had failed to pay all liquidated duties. The government asserts that plaintiff's failure to pay the accrued interest results in an outstanding duty balance as a result of applying 19 C.F.R. § 24.3a(c)(4), which provides:

> In the case of any late payment, the payment received will first be applied to the interest charge on the delinquent principal amount and then to payment of the delinquent principal amount.

Yet, this regulation was published in the Federal Register on October 1, 1986 and its effective date is October 31, 1986. 51 Fed. Reg. 34954. As this regulation was not in existence in January 1986 when plaintiff paid the liquidated duties, it does not operate to retroactively transform monies paid and credited toward duties into payments toward interest.

Thus, the main issue is whether interest may properly be considered a charge or exaction. Plaintiff asserts that interest is not a "charge" or "exaction" as those terms have special meaning within the customs realm and argues that interest is a separate financial consideration, distinguishable from such charges as storage or overtime charges, and exactions, such as penalties or liquidated damages.

The Court has examined several lexicons in an attempt to discern whether "interest" is considered a "charge" or "exaction". Consistently, interest is defined as the basic cost, or the price paid, for borrowing money, or for the use of money. *Webster's Third New Int'l Dictionary* 1178 (1981); *Black's Law Dictionary* 729 (5th Ed. 1979); C. Ammer and D.S. Ammer, *Dictionary of Business and Economics* 210 (1977). A "charge" encompasses a broad range of meanings including: an obligation or duty, a liability, an expense or the price of an object; an entry in an account of what's due from one party to another. 1 West's *Law & Commercial Dictionary in Five Languages* 237 (1985); *Webster's supra,* at 377; *Black's supra,* at 211. Finally, an "exaction" has been described as the wrongful demand for payment under color of official authority, where no payment is due; an unjust compulsory levy. *Webster's, supra,* at 790; *Black's, supra,* at 500; *accord Carlingswitch, Inc.* v. *United States,* 85 Cust. Ct. 63, 66, C.D. 4873, 500 F. Supp. 223, 226–27 (1980), *aff'd* 68 CCPA 49, C.A.D. 1264, 651 F.2d 768 (1981).

There is ample support in these sources for concluding that interest, as an incidental expense to maintaining an unpaid debt, would be categorized as a charge; it is an entry in an account of what is due from one party to another. There appears no basis for a distinction between interest and other account liabilities. While the specific question of whether interest is a charge or exaction appears never to have been addressed in this court, caselaw has established that the imposition of certain fees are charges or exactions, subject to protest procedures and judicial review.

In this vein, charges and exactions are "actual assessments of specific sums of money (other than ordinary customs duties) on imported merchandise." *Alberta Gas Chemicals, Inc.* v. *Blumenthal,* 82 Cust. Ct. 77, 81–82, C.D. 4792, 467 F. Supp. 1245, 1249–50 (1979). In concluding that diversion duties were an exaction, the court in *Gen-*

eral Motors Corp. v. *United States*, 10 CIT ——, ——, 643 F. Supp. 1139, 1144 (1986), reasoned that this payment was in fulfillment of the importer's statutory obligation.[1] Therefore, interest, a monetary assessment incidental to the importation of goods, which plaintiff must remit pursuant to its statutory obligation, is within the common and judicial descriptions of charges and exactions.

Nevertheless, plaintiff contends that the purpose of the new § 1505(c) was not intended to elevate the assessment of interest to a jurisdictional level within the purview of 28 U.S.C. § 2637(a). In commenting on the passage of this legislation, Congress explained that it was intended to remedy the practice whereby Customs determined that increased or additional duties were due, but there was no requirement that these sums be paid on liquidation. Neither was it necessary that they be paid before the importer protest their assessment; thus, no interest on such amounts could be assessed. H.R. Rep. No. 98–1015, 98th Cong., 2d Sess. 67, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4960, 5026. The Congressional report further reveals:

> Until February 18, 1982, the United States Customs Service had based its debt collection responsibilities upon the proposition that "[a] bill for duties, taxes, or other charges is due and payable upon receipt thereof by the debtor" (19 CFR 24.3(e)). However, on February 18, 1982, the United States Court of Customs and Patent Appeals upheld a decision of the Court of International Trade in the case of *United States* v. *Heraeus-Amersil, Inc.*, 671 F.2d 1356. The decision provides that increased or additional duties determined to be due on liquidation or reliquidation are not due and payable by the importer until either the protest period has expired without a protest being filed (90 days after liquidation or reliquidation), or where a protest has been filed and denied, the time to appeal to the Court of International Trade under 28 U.S.C. 1581(a) has expired (180 days after denial). Thus, in the latter situation, collection efforts cannot be initiated for a minimum of 270 days.
>
> The effect of the proposed legislation would be to allow Customs to take immediate steps to collect monies determined to be due and payable to the United States. If the duties were not paid within the time allotted by this bill, then the importers would be assessed interest in accordance with section 306 of Public Law 96–304 and regulations to be promulgated by the Customs Service.
>
> Without legislation to overturn the *Heraeus* decision and with the current high interest rates prevailing throughout the country, it is anticipated that any normal business entity, legally able to delay payment of large sums of money without interest, would take advantage of that opportunity.

[1] *Compare ITT Semiconductors* v. *United States*, 6 CIT 231, 576 F. Supp. 641 (1983) (voluntary payment in settlement of penalty not a charge or exaction) *with Mitsubishi Int'l Corp. v. United States*, 81 Cust. Ct. 145, C.R.D. 78–9, 454 F. Supp. 458 (1978) (imposition of a penalty not prohibited from being protested as a charge or exaction).

H.R. Rep. No. 98–1015 at 68, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 5027.

Plaintiff suggests that the proper interpretation of § 1505(c) merely sets the date when interest would be payable in the event that plaintiff is not successful in its protests or via judicial review. While this is certainly consistent, as plaintiff notes, with defendant's reciprocal obligation to pay interest on any overpayment by plaintiff from the date the duties were paid, that does not resolve the inquiry as to whether the interest must be paid before commencing the action. By enacting subsection (c) to § 1505, Congress sought to statutorily delimit the time for the payment of duties, and imposed upon the importers the consequence of interest for failing to remit payment in accordance with this deadline. The Court regrettably cannot agree with plaintiff that this does not rise to a jurisdictional impediment, for to do so would seemingly frustrate the very purpose of the statute. As the duties were due on a specified date and not paid, plaintiff was charged for the use of that money. As that interest charge was not paid prior to commencing this action, the prerequisites necessary to invoking this court's jurisdiction as required by 28 U.S.C. § 2637(a) were not satisfied.

Finally, plaintiff alleges that § 1505(c) is only effective for entries *liquidated* after the effective date of the statute (Nov. 29, 1984) but does not apply to its merchandise, which was entered before this date. Plaintiff argues that the Court would be giving unlawful retroactive effect to the statute if it was concluded that the statute applies to imports *entered* before November 29, 1984.

As the Supreme Court has stated:

> [T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past * * * [and] a retrospective operation will not be given to a statute which interferes with antecedent rights * * * unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature'.

United States v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982) (quoting *Union Pac. R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913)).

Nevertheless, the Court does not consider there to be any retroactivity issue. The effective date provision states that the enactment of subsection (c) shall take effect on the 30th day after October 30, 1984 (Nov. 29, 1984). Pub. L. 98–573, Title II, § 214(c)(5)(A), 98 Stat. at 2989. Albeit, this does not specify whether it applies to goods entered or only liquidated after that date but the legislative history does state that the provision will "be effective thirty days after enactment and any pending duties would be due thirty days following enactment." H.R. Rep. No. 98–1015 at 5025–26. This language clearly contemplates that this amendment was intended to apply where duties where already assessed since they "would be due thirty days following enactment." Therefore, there is no basis to conclude that

only goods entered after the effective date of the statute would be subject to those time limits. As the statute merely prescribes the time for payment of duties once the entries are liquidated, and since liquidation, the operative event triggering the time for assessment of interest, occurred after the statute was enacted, there is no retroactive application which would deprive plaintiff of any vested substantive right.

CONCLUSION

Pursuant to 28 U.S.C. § 2637(a), all charges and exactions must be paid prior to the commencement of an action. The terms charges or exactions include the assessment of interest on the late payment of liquidated duties. As plaintiff has failed to remit this amount, the Court is constrained to dismiss the action for lack of jurisdiction. Thus, defendant's motion to dismiss is granted and the action is dismissed. SO ORDERED.

(Slip Op. 88–30)

USX CORP., F/K/A UNITED STATES STEEL CORP., PLAINTIFF *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND PROPULSORA SIDERURGICA, S.A.I.C., DEFENDANT-INTERVENOR

Court No. 85–09–00325

Before RESTANI, *Judge.*

[ITC determination remanded.]

(Dated March 15, 1988)

USX Corporation (John J. Mangan, J. Michael Jarboe, Craig D. Mallick and *Robin K. Capozzi)* for plaintiff.

Lyn M. Schlitt, General Counsel, *James A. Toupin,* Assistant General Counsel and *Timothy M. Reif,* United States International Trade Commission, for defendants.

Mudge, Rose, Guthrie, Alexander & Ferdon (David P. Houlihan, Jeffrey S. Neeley) for defendant-intervenor.

OPINION AND ORDER

RESTANI, *Judge:* Plaintiff, USX Corporation, brings this action challenging the final determination of the United States International Trade Commission (ITC) that an industry in the United States was neither materially injured nor threatened with material injury by reason of imports of cold-rolled carbon steel plates and sheets from Argentina that were sold at less than fair value. *Cold-rolled Carbon Steel Plates and Sheets from Argentina,* USITC Pub. 1967, Inv. No. 731–TA–175 (March 1987) (Remand Determination). The March 1987 determination was the second determination in this investigation. The first negative determination, 50 Fed. Reg.

5136 (Feb. 6, 1985) was upheld by this court in February 1987 with respect to ITC's findings on like product, domestic industry and condition of the domestic industry. *USX* v. *United States*, 11 CIT ——, 655 F. Supp. 487 (1987).[1] Certain other aspects of that determination concerning the issues of causation, cumulation and threat of material injury were remanded to ITC by order dated February 9, 1987, for further investigation and analysis. Each of these issues will be discussed separately.

I. CAUSATION

In its previous opinion the court rejected ITC's majority causation analysis, stating that ITC's reasoning was not sufficient to support a negative determination. After determining that the domestic industry was materially injured, ITC concluded that less than fair value imports from Argentina were not the cause of material injury, basing its conclusion on two factors: First, ITC noted that although imports from Argentina rose consistently from 1981 to 1984 only "minimal market penetration" was achieved throughout the period of the investigation. Second, ITC found that while Argentine imports undersold domestic cold-rolled sheets by margins ranging from 5% to 14%, it could not confirm any actual instances of lost sales and revenue due to Argentine imports. *Id.* at 489.

The court rejected ITC's analysis of market penetration because it "consisted solely of the statement that levels of market penetration remained low and stable * * * [w]ithout discussing the significance of this trend or its relationship to other facts uncovered in the investigation * * *." *Id.* at 490 (footnote omitted). The significance of a quantity of imports and not absolute volume alone was especially relevant in this case, noted the court, given the fact that ITC had previously recognized that cold-rolled steel is inherently a price sensitive and fungible product and that "the impact of seemingly small import volumes [and penetrations] is magnified in the marketplace." *Id.* (quoting *Certain Carbon Steel Products from Spain*, USITC Pub. 1331, at 16–17, Inv. Nos. 701–TA–155, –157 to –160, –162 (December 1982)).[2]

The court rejected the second part of ITC's causation analysis because ITC had relied exclusively upon instances of lost sales and revenue to show the effect of Argentine imports on the domestic industry after admitting that it had failed to investigate four of seven allegations of lost sales and all three reported instances of lost revenue. The court held that such an inadequate investigation, standing alone, could not support a negative determination, given proven consistent margins of underselling. *Id.* at 491. ITC was ordered to

[1] The like product was found to be cold-rolled carbon steel sheets and plates. The domestic industry is comprised of all domestic producers of like product.

[2] A commissioner has raised a concern that the court has required ITC to explain how its various determinations are in harmony. There is no such requirement. Different factual settings will give rise to different results. If clear reasoning supporting a determination is lacking, however, the determination may appear to be arbitrary if viewed in the context of contrary determinations based on seemingly similar facts. Deviations from established agency practice or precedent, of course, must be explained.

undertake a more thorough investigation and consideration of these factors if they were to be the basis of the negative determination.

The court now has before it the results of the remand. "In order for the Commission's determination to be upheld in this case, the court must be able to discern from the determination that a majority of the Commission has based its conclusions upon legally sufficient reasoning." *BMT Commodity Corp.* v. *United States*, 11 CIT ——, 667 F. Supp. 880, 882, *reh'g denied*, 11 CIT ——, 674 F. Supp. 868 (1987), *appeal docketed*, No. 88-1188 (Fed. Cir. Jan. 22, 1988). The causation analyses separately set forth by at least two of the commissioners in the four person majority do not satisfy this standard of review. Therefore, the court has no alternative but to remand this action to ITC for analysis that is in accordance with law.[3] The two analyses found deficient are addressed separately as follows.

A. *The Five Factor Causation Analysis*

Plaintiff challenges the approach to causation analysis offered by one commissioner which would require ITC to consider five factors when determining whether the factual setting of a particular case merits an affirmative finding. According to the commissioner, "[T]he stronger the evidence of the following * * * the more likely that an affirmative determination will be made: (1) large and increasing market share, (2) high dumping margins, (3) homogenous products, (4) declining prices and (5) barriers to entry to other foreign producers (low elasticity of supply of other imports)." Remand Determination at 14 (citing *Certain Red Raspberries from Canada*, USITC Pub. 1707, at 16, Inv. No. 731-TA-196 (June 1985).[4]

Applying these factors in the present case, the existence of relatively high dumping margins was acknowledged along with substitutable imported and domestic product and downward pricing trends, all consistent with an affirmative finding, but it was concluded that "these factors are outweighed by the absence of barriers to entry, and the fact that cumulated import penetration is very low, which strongly suggests the absence of unfair price discrimination." Remand Determination at 19–20 (footnote omitted).

Plaintiff asserts that this approach to causation analysis "disregards the explicit statutory criteria provided by the Congress for the conduct of injury investigations," and transforms causation analysis into a methodology for determining the existence of a new unfair trade practice, namely, "unfair price discrimination." Re-

[3] Five separate opinions were issued on remand. Because one commissioner (out of five who acted on the matter) has dissented in the present action, ITC's negative determination can only be upheld if the court finds the views of at least three of the remaining four commissioners to be in accordance with law. It would be poor judicial economy to review in detail the separate decisions of the commissioners who utilized traditional causation analyses, as the court does not know what approach will be taken by ITC on further remand. It is not clear that the investigation concluded to date will satisfy a majority of the commissioners under the standards set forth by the court. The court also notes, to the extent possible in a case of multiple opinions, commissioners should indicate the portions of their colleagues' opinions with which they agree. This might obviate further remands. Of course, a single majority opinion with the necessary dissents or additional views would expedite the review process.

[4] In *Copperweld Corp.* v. *United States*, 12 CIT ——, Slip Op. 88-23 (Feb. 24, 1988) the court sustained an ITC negative determination which also cited the five factor analysis discussed here. That opinion is distinguishable because the court held that the commissioner's views did not rest solely on the five factor analysis and the rationale of *Red Raspberries* was not considered to be part of the determination. *Id.* at 30-31 and n.12.

sponse of USX Corporation to the Remand Determination of the International Trade Commission (Plaintiff's Brief) at 10 & 13. Alternatively, plaintiff argues that even if the court were to accept this approach to causation, "application of that analysis to the facts of this case overwhelmingly demonstrates the existence of injury by reason of imports." *Id.* at 14. In order to decide whether the opinion resting on this analysis is supported by substantial evidence and is otherwise in accordance with law, it is appropriate to examine the nature and relevance of the two determinative factors in greater detail, that is, low import volume and no barriers to entry.

In the previous opinion, the court recognized that import volume alone cannot be used to gauge accurately the effect of imports in the cold-rolled steel industry. The court directed ITC on remand to explain the significance of import volume or its relationship to other facts uncovered in the investigation. *USX*, 655 F. Supp. at 490–91. The limited discussion of market penetration presented here offers no such explanation. Instead, it is stated that, "[c]umulated imports accounted for less than 1 percent of apparent U.S. consumption during 1981, then increased to 1.4 percent in 1982 and 2.0 in 1983 [while] [i]mport penetration was 3.4 percent in January–September 1984 compared to 1.9 percent in the corresponding period of 1983." Remand Determination at 15. It is then concluded that, "[t]he cumulated import penetration of Argentina and Korea is very small and not consistent with a finding of unfair price discrimination." *Id.* This conclusory statement does not support a negative determination. It leaves unanswered the question of how the volume of imports relates to injury, particularly in the sense of the third statutory factor, impact on the domestic industry.[5] The court, therefore, is left to examine the fifth factor in the five factor causation analysis—barriers to entry—to determine whether it provides the missing link.

An attempt is made in the determination to justify use of the five factor test and reliance on barriers to entry, in particular, as the determinative factor, by equating unlawful dumping with a particular form of "unfair price discrimination." In *Red Raspberries*, cited in this determination in support of the five factor analysis, it is more specifically explained that the antidumping statute is intended to protect U.S. industry only from unfair price discrimination in the form of predatory pricing, as that term is defined in the determination. *Red Raspberries*, USITC Pub. 1707, at 13–14 (citing the legislative history of the Trade Act of 1974 (1974 Act), S. Rep. No. 1298, 93rd Cong. 2nd Sess. 179, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7316). The *Red Raspberries* determination goes on to state that:

[5] In determining whether the domestic industry is materially injured by less than fair value imports, the statute directs ITC to consider among other factors—

(i) the volume of imports of the merchandise which is the subject of the investigation,
(ii) the effect of imports of that merchandise on prices in the United States for like products, and
(iii) the impact of imports of such merchandise on domestic producers of like products.

19 U.S.C. § 1677(7)(B) (1982).

> Price discrimination can take several forms. The fact that Congress referred to *unfair* price discrimination suggests to believe that Congress meant some type of predatory pricing. Predatory pricing is a form of strategic behavior in which a firm lowers the price of its product below the marginal cost of production. Such behavior is only rational if the firm expects to be able to raise its prices in the future to a level at which it can more than recoup the losses it suffers in the present. Thus, predatory pricing can only be practiced by firms that have or expect to have market power.

Red Raspberries, USITC Pub. 1707, at 14–15 (footnote omitted) (citing R. Posner & F. Easterbrook, *Antitrust*, 98–99, 680 (2d ed. 1981)). The problem with this position is two-fold. One flaw is that this view necessarily makes the intent of a foreign producer the focus of the ITC causation inquiry. Another, but not unrelated flaw, is that this view seems to assume that the purpose of the antidumping statute is to prevent a particular type of "injury to competition" rather than merely material "injury to industry."

The "injury to industry" versus "injury to competition" distinction in international trade laws dates back to the early part of this century. The Antidumping Act of 1916 (codified at 15 U.S.C. §§ 71–77 (1982)) was enacted by Congress as an unfair competition law focusing specifically on the practice of predatory dumping. *See* Hiscocks, *International Price Discrimination: The Discovery of the Predatory Dumping Act of 1916*, 11 Int'l Law. 227 (1977). The 1916 Act imposed criminal sanctions on anyone importing articles into the United States:

> [A]t a price substantially less than the actual market value or wholesale price * * * *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

15 U.S.C. § 72 (1982). Although the Act mentions injury to industry, the entire thrust of the statute, including the intent requirement, cause it to be recognized as a particular type of antitrust statute. *See Zenith Radio Corp.* v. *Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1223 (E.D. Pa. 1980), *aff'd, in part, reversed, on other grounds, and remanded. sub nom., In re Japanese Electronics Products Antitrust Litig.*, 723 F.2d 319 (3d Cir. 1983), *cert. denied* 55 U.S.L.W. 3730 (April 27, 1987) (No. 86–1453); 723 F.2d at 325 & n.4.[6]

In the Antidumping Act of 1921, however, Congress inserted an injury test considerably more sensitive to conditions in the domestic industry. Antidumping Act of 1921, ch. 14, § 201, 42 Stat. 11 (repealed 1979) (formerly codified, as amended, at 19 U.S.C. § 160(a)

[6] In an appeal from a separate opinion of the third circuit in that case, the Supreme Court declined an invitation to review the decision regarding the Antidumping Act of 1916. *Matsushita Elec. Indus. Co.* v. *Zenith Radio*, 475 U.S. 574, 578 n.3 (1986).

(1976)). Likewise, the Trade Agreements Act of 1979 (1979 Act), which repealed the 1921 Act and re-enacted its provisions, as amended, into the Tariff Act of 1930, states that antidumping duties are to be imposed only upon a showing that a domestic industry is materially injured, threatened with material injury or that the establishment of a domestic industry is materially retarded by reason of less than fair value imports. 19 U.S.C. § 1673 (1982).

As indicated, the interpretation under discussion of the antidumping statute reflects a belief that despite the lack of express limitation in the statutes, Congress intended that dumping duties be enforced only if a certain form of anticompetitive behavior is occurring. The analysis begins with the assumption that foreign firms behave as rational profit maximizers. From this assumption follows the statement that:

> [I]f the factual setting in which the unfair imports occur does not support a finding that there is any gain to be had by unfair price discrimination, it is reasonable to conclude that any injury or threat of injury to the domestic industry is not 'by reason of' such imports.

Remand Determination at 13.[7] To fully comprehend the impact of this statement it is important to note the additional comments that unfair price discrimination is predatory pricing in the form of pricing below the marginal cost of production and that no gain can be had by such price discrimination unless an exporting firm ultimately is able to raise its prices in the U.S. market to take advantage of its increased market share. *See supra* p. 9 (quoting from *Red Raspberries,* USITC Pub. 1707, at 14–15). It is further stated that a firm will be unable to raise prices if other nations are capable of exporting to the U.S. at competitive prices. Under this analysis, gainful dumping cannot be accomplished and, therefore, proof of causation of injury by dumped imports will not exist, unless there are barriers to entry of other imports. Thus, contrary to defendants' argument, this fifth factor is not just one of many relevant factors, but its absence likely will produce a negative determination in all cases relying solely upon the five factor test.[8]

The view reflected in the determination rests upon the principle that pricing that is above the marginal cost of production cannot be said to be contrary to acceptable profit maximizing behavior, as a general matter. *See* R. Posner & F. Easterbrook, *Antitrust,* 680–686 (2d ed. 1981);[9] Barcelo, *Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code,*

[7] In *Red Raspberries,* an additional reason was given as to why the absence of like product imports from other countries would support an affirmative finding on causation, namely that "it provides some assurance that the injury to the domestic industry is by reason of the investigated imports and not caused by imports from other countries." USITC Pub. 1707, at 17. In this case, however, this explanation of barriers to entry appears for the first time in defendants' brief in support of the remand determination and it does not appear that the significance of barriers to entry was analyzed in this manner. Furthermore, the statement made in *Red Raspberries* in 1985 may have contemplated standards for cumulation which have been held to be contrary to law.

[8] This is demonstrated in this case because only the fifth factor is available to relate volume to price effect and impact to produce a negative result. The other factors were affirmative.

[9] This work is relied upon in *Red Raspberries* which has been cited as a fuller statement of the views expressed here, thus the court assumes that the definition of marginal cost of production contained therein is also accepted. It is "change in total costs brought about by increasing (or decreasing) output by one unit." Posner & Easterbrook, *supra,* at 684.

57 Cornell L. Rev. 491, 504–06 (1972). Under this view, only pricing below the marginal cost of production can be said, with any certainty, to be uneconomic and anticompetitive. Thus, by asking whether, rationally, goods would be priced below the marginal cost of production, the commissioner asks whether the pricing is unacceptably anticompetitive, not whether it is injurious to the industry in some other material way.[10]

In international trade it is the object of an "injury to competition" causation test to protect the competitive process itself and not necessarily individual competitors. *See* Barcelo, *supra*, at 513–17. Under the view expressed in the determination, only predation of the type described furnishes the requisite causation of injury to competition.[11] The "injury to industry" causation standard, however, focuses explicitly upon conditions in the U.S. industry. *Id.* In effect, Congress has made a judgment that causally related injury to the domestic industry may be severe enough to justify relief from less than fair value imports even if from another viewpoint the economy could be said to be better served by providing no relief. The court, by finding the test applied here invalid, does not condemn for all cases any inquiry into effects on competition; such inquiry can be a useful way of exploring the causation issue. Such an inquiry, however, cannot supplant the inquiry required by statute. Thus, any causation analysis must have at its core the issue of whether the imports at issue cause, in a non *de minimis* manner, the material injury to the industry which has been found.[12]

To avoid confusion regarding the legislative history cited in the determination, further comment is needed on the concept of rational profit maximization. As noted, at the core of the five factor analysis is the assumption that all producers act as rational profit maximizers. It is not universally accepted, however, that producers of goods for export always act in such a manner. In recent years, many foreign export industries have been nationalized, or at least subjected to increasing political pressures. It has been stated that these industries no longer seek to enhance profits as much as they attempt to pursue national social goals such as full employment. *See* Fisher, *Dumping: Confronting the Paradox of Internal Weakness and External Challenge,* 1 Mich Y.B. Int'l Legal Stud. 11, 19–23 (1979). Exporters who do not act as rational profit maximizers might be willing to sell at less than fair value even though there is no foreseeable potential for gaining an increased market share and raising prices. Such behavior could cause permanent, continuing in-

[10] The Supreme Court in *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) observed that "predatory pricing schemes are rarely tried, and even more rarely successful." (The court was concerned with a claim of conspiracy under section one of the Sherman Act, but its discussion of predatory pricing was more general.) Congress certainly has been aware of the scope and complexity of administration of the antidumping laws, so much so that it frequently has amended such laws and has approved considerable spending to keep elements of government functioning to carry out those laws. Presumably, Congress, in approving such legislation, intended to protect industries in the United States from something other than a rare and unusual occurrence.

[11] Others who favor the "injury to competition" approach might recognize as injurious behavior which does not reach the level of predation described.

[12] Defendants argue that ITC has applied the proper standard because it found injury to industry. This is true, but if its causation analysis relates only to injury to competition in the form of predatory pricing as defined here, ITC has ignored its basic finding.

jury to the domestic industry, contrary to the view discussed. The commissioner apparently believes that Congress did not intend to address any such problem that might exist.

In support of the rational profit maximizer approach, the commissioner quotes from the legislative history of the 1974 Act, S. Rep. No. 1298, *supra*, at 179: "importers as prudent businessmen dealing fairly would be interested in maximizing profits by selling at prices as high as the U.S. market would bear." Remand Determination at 12–13. The statement, however, was not placed in the legislative history to establish an axiom about the conduct of producers of exports or to impose an injury by predation standard. It appeared in the context of a general discussion about "technical dumping," which occurs when foreign imports' margins of underselling exist because there is a shortage of supply in the U.S. market. S. Rep. No. 1298, *supra*, at 179. By adopting the language of this section out of context as support for the entire predatory pricing analysis, the determination expands the concept of technical dumping to include any case in which there are no barriers to entry. The court believes that analysis from the point of view of rational profit maximization is necessary in many situations, but the seeming acceptance of this view by Congress in some instances does not support the application of the five factor analysis used here. Even if one agrees that one must assume rational profit maximizing behavior, it does not follow necessarily that one must also accept an injury by predation standard. Rational profit maximizers might engage in behavior which is injurious to an industry in a way that cannot be described as predatory in the sense used here but is nonetheless prohibited by the antidumping laws.

As indicated, the commissioner has expressly cited ITC's *Red Raspberries* determination as a fuller statement of the views expressed here. There it is stated that statutory causation factors such as volume and pricing data are nothing more than "useful proxies" for a "direct inquiry into the intent of a foreign producer [which] would be difficult at best." *Red Raspberries*, USITC Pub. 1707, at 16. As stated, it is the 1916 Act which focuses on intent. In applying the antidumping law under which this action is brought it is improper for ITC to place at the center of its causation analysis the intent of a foreign producer. This inquiry is unavoidable, however, if one equates unlawful dumping with unfair price discrimination in the form of predatory pricing. Unlike the 1916 Act, there is neither a scienter requirement to be found in the statute relevant here, nor evidence in the relevant legislative history that Congress intended such a requirement. Thus, contrary to the suggestion in defendants' brief, what occurred in this case is not the mere incorporation of another relevant economic factor into a causation analysis as is clearly permissible under 19 U.S.C. § 1677(7)(B)–(C) (1982). Instead, the nature of the reliance on the barrier to entry factor has worked to

change the focus of the injury investigation in a manner not permitted by Congress.

B. *Causation Analysis Based on an Elasticity Estimate*

The economic approach to causation analysis offered by another commissioner attempts to determine whether the domestic industry has been injured by reason of less than fair value imports by looking specifically at the effects of imports on domestic shipments, domestic prices and domestic sales in a unique way.

In order to determine the effect on domestic shipments, it is assumed that if importers had to pay fair value for the subject Argentine goods, those goods would be priced out of the U.S. market entirely and the resulting business would all go to U.S. firms.[13] Remand Determination at 28. Using 1983 as an example, this would mean that "the 130,000 short tons imported from Argentina would have been added to the 12,972,000 short tons supplied by U.S. firms." *Id.* at 29 (footnote omitted). From this, it is found that "the dumped imports from Argentina reduced domestic shipments by at most 1 percent." *Id.*

"[A]n *upper bound* for the degree to which dumped imports suppressed domestic prices" is next calculated using an elasticity of domestic supply estimate provided by the Department of Commerce's Office of Economics. *Id.* According to this estimate, "a 1 percent increase in domestic price will produce a 3.5 percent increase in the quantity supplied by domestic producers." *Id.* at 29–30 (footnote omitted). It is then stated that, "[t]his also means that a 1 percent increase in demand for domestic product will lead to an increase in domestic price of only 0.29 percent (equals (1/3.5) times 1 percent) * * *. Thus the maximum degree of price suppression in this case is 0.3 percent." *Id.* at 30.

Finally, calculating lost sales, it is found that "since dumped imports reduced domestic shipments by 1 percent and suppressed domestic prices by 0.3 percent, this means that dumped imports reduced industry sales by only 1.3 percent (1 percent + 0.3 percent)." *Id.* Based on these calculations, it is concluded "that the adverse effects on the domestic industry from dumped imports from Argentina were very tiny * * *. [and] that dumped imports from Argentina were not a cause of material injury. *Id.* at 31.

Plaintiff argues that this theoretical economic analysis "ignores the statutory indicia of injury," Plaintiff's Brief at 16–17; that the data relied on, namely the report of the Office of Economics, is not evidence which may support a final determination, *id.* at 17–18; that this approach "fails to articulate any rational[ ] connection between the results of [the] elasticity analysis and [the] negative determination," *id.* at 19; and that unlike prior cases in which eco-

[13] As the commissioner points out, this assumption is favorable to the domestic industry in two respects. It assumes the entire dumping margin was passed through to reduce the price of Argentine imports, and it assumes that none of the business lost by the Argentines, if they were forced to sell their goods at fair value, would go to other foreign suppliers such as Brazil and Korea.

nomic analysis of this sort has been approved by the court, this analysis "lacks any inherent showing of confidence and was employed in a manner which excluded any participation by any of the parties to the proceedings below." Plaintiff's Reply Brief at 17.

While this approach to causation analysis has the potential for explaining, within the confines of the statutory framework and in an improved manner, how less than fair value imports affected the domestic industry, its utilization here must be rejected because of the exclusive reliance on an elasticity estimate which the determination does not link to the specific facts of this case. This court has approved the use of valid economic models to assist ITC in its causation analysis. In *Alberta Pork Producers* v. *United States*, 11 CIT ——, 669 F. Supp. 445 (1987), the court held that ITC may accept price elasticity estimates as a reliable indicator for judging the effect of imports on U.S. prices. Responding to plaintiff's argument that such reliance was misplaced because ITC "did not test the confidence level of the estimates to determine if they meet a scientifically acceptable degree of certainty" *id.* at 462, the court stated:

> While it is true that "[t]he Commission is not required to accept data which in the course of ordinary scientific research could properly be rejected," *Maine Potato Council* v. *United States*, 9 CIT 460, 462, 617 F. Supp. 1088, 1090 (1985), nothing in the statute requires that the Commission reassess data collected and accepted in its determination in order to verify its consistency with some ambiguous level of scientific reliability.

Id. at 463. As in *Alberta Pork*, this court does not require that ITC establish the accuracy of elasticity estimates to a scientific degree of certainty before they may be used, but this does not preclude a requirement that some threshold degree of reliability be established in the record if commissioners are to rely almost exclusively on such estimates in fulfilling their statutorily mandated task.

In *Alberta Pork*, the court concluded that ITC's reliance on price elasticity estimates was reasonable and in accordance with law, "[i]n light of the documented relationship between hog supply and prices * * *." *Id.* Before deciding to rely on these estimates, ITC heard expert witnesses representing both parties testify "that increased Canadian supplies helped depress U.S. swine prices." *Id.* at 462–63. ITC also accepted estimates submitted by both sides' experts and ultimately chose to rely on a "range of elasticity estimates * * * 'because the complexity of economic relationships and the problems of econometric estimation makes it impossible to obtain a precise estimate.'" *Id.* at 462 (citation omitted). This expert testimony and adversarial participation in the administrative process below helped assure the basic reliability of the estimates subsequently relied on.

By contrast, the in present case, as plaintiff notes, "the parties were not permitted to participate—by review, comment or otherwise—in the economic evaluation and the elasticity derivations em-

ployed * * *." Plaintiff's Reply Brief at 18. This particular elasticity analysis was applied to this product for the first time on remand and was done without seeking input from any of the parties. *See Id.* The basic reliability of the elasticity estimate is, therefore, being addressed for the first time on the occasion of judicial review.

Having thoroughly examined the record before this court, it appears as if the source of this estimate is questionable at best. The estimate is taken from a study published in 1981, which seems to be based on data compiled between 1956 and 1976. Confidential Record Document Number (CR) 17, at 24 n.3 & 28 n.1 (supplemental analysis by the Office of Economics, citing R. Crandall, *The U.S. Steel Industry in Recurrent Crises* (Brookings, 1981)). It is at least an open question as to whether data compiled for periods which were decades prior to this investigation can reliably be used to establish assumptions about the state of the current steel industry given subsequent advances in technology and other changes in the industry. This question cannot be ignored by ITC if the elasticity estimate is to control the result. Furthermore, the 3.5 estimate relied upon refers to the carbon steel industry in general and nothing in the record indicates why an estimate for the industry in general may be used to reach conclusions regarding only one segment of that industry—cold-rolled plates and sheet. CR 17, at 28 n.1. In addition, it is only one of a number of elasticity estimates mentioned in the record and no explanation is offered by the commissioner as to why it is the best one.

In *Alberta Pork*, though the court approved the use of elasticity estimates in general, it rejected the use of estimates that did not describe the specific product under consideration. Presented with a record that was "at best ambiguous as to whether [elasticity estimates] were derived from changes in live swine and/or pork or only live swine [prices]," 669 F. Supp. at 463, the court remanded the action to ITC for a determination as to whether the estimates were only for live swine. *Id.* at 464. If a commissioner finds it appropriate to address causation analysis in this case by means of a mathematical equation, that commissioner must provide the court with an explanation of why the factors in this equation are reliable in terms of the case at issue. Furthermore, unlike *Alberta Pork* where elasticity estimates were used only in evaluating price effects of subject imports, the estimate has been used here to calculate both price effects and impact on domestic industry. The very centrality of the estimate to the causation analysis reinforces the need for explanation. The fact that assumptions favorable to the domestic industry have been incorporated into the calculations will not save an analysis flawed at its core.

Finally, even if the court were to assume that the elasticity estimate used was a reliable indicator for this case, this analysis is still in need of further explanation before the court can conclude that it is based upon substantial evidence and in accordance with law. Par-

ticularly puzzling is the methodology for calculating lost sales. Rather than relying on specific evidence of lost sales, the commissioner employs a single equation.[14] *See supra* p. 18 (quoting Remand Determination at 30). Presumably, there is a coherent explanation of the derivation of the equation which could be set forth. Until such equations are accepted as the everyday subject of antidumping decisions, however, they must be explained for the benefit of the parties and the court. Furthermore, there would appear to be some alternatives to analysis of the impact of imports apart from reliance on anecdotal lost sales data or the untested universal equation utilized here. Where the equation is so central to the conclusion, relating it to some data from the actual case under investigation (in addition to import volume), and allowing the parties to comment on it, would seem prudent. Thus, at least two of the four opinions constituting the majority are legally flawed and not based on substantial evidence.

II. CUMULATION

As indicated in the court's previous opinion, while cumulation was not statutorily mandated in investigations commenced prior to the Trade and Tariff Act of 1984 (1984 Act), it might nonetheless be arbitrary and an abuse of discretion for ITC to refuse to cumulate where the conditions of trade indicate cumulation would be appropriate. *USX*, 655 F. Supp. at 491–92. With a single exception,[15] the commissioners have elected on remand, as in the previous determination, not to cumulate the imports from Argentina with those from any other country. Rather than focusing on the conditions of trade in all instances, a majority of commissioners have cited a number of other reasons in support of their decisions not to cumulate Argentine imports with imports from Brazil, South Africa and Spain.[16] These reasons are discussed below.

Defendants state that:

> Under pre-1984 law, it was well-established Commission practice not to cumulate imports that were the subject of an investigation (i) in which the Commission had determined that an industry in the United States was not materially injured or threatened with material injury by reason of the subject imports, (ii) that had been terminated prior to the issuance of a final determination by the Commission or (iii) in relation to which the petition had been withdrawn.

Defendants' Brief at 63. Defendants note that it is not appropriate to cumulate in these situations, "because the subject imports had not been and would not be finally determined to be materially inju-

[14] The commissioner notes some evidence of record that might show lost sales due to less than fair value imports. She views the evidence as anecdotal and generally "not probative on the issue of causation." Remand Determination at 30.

[15] On remand, one commissioner has read the court's prior opinion to mandate cumulation of imports from Korea with imports from Argentina.

[16] ITC has also refused to cumulate imports of Mexico which had been subject to a countervailing duty investigation terminated in April 1984 when plaintiff withdrew its petition. *Carbon Steel Products from Mexico*, 49 Fed. Reg. 17,700 (Apr. 25, 1984). Though plaintiff originally urged ITC to include Mexico as a candidate for cumulation, it does not presently challenge their decision not to do so.

rious to a U.S. industry and were not the subject of a pending investigation." *Id.* at 64.[17] Additionally, a number of commissioners refuse in this case, and have refused in past determinations, to cumulate imports that are already the subject of an order imposing duties under the antidumping or countervailing duty statutes, reasoning that once duties are levied these imports "cease being unfairly traded." *See id.* at 68.

In the present case, antidumping investigations were commenced against South Africa, Spain, and Argentina, among others, in response to plaintiff's petition. *Carbon Steel Products from Argentina, Australia, Finland, South Africa, and Spain,* 49 Fed. Reg. 6,808 (Feb. 23, 1984). Plaintiff chose to withdraw its petitions with respect to imports from South Africa and Spain in order to facilitate entry into Voluntary Restraint Agreements (VRA) with those countries.[18] At the times the petitions were withdrawn, the imports of both countries had been the subject of an affirmative ITC preliminary determination. *Carbon Steel Products from Argentina, Australia, Finland, South Africa, and Spain,* 49 Fed. Reg. 13,442 (Apr. 4, 1984). The Spanish imports were also the subject of an affirmative ITA final less than fair value determination. *Carbon Steel Products from Spain,* 49 Fed. Reg. 48,582 (Dec. 13, 1984).

It is the position of several commissioners that once petitions are withdrawn, imports covered by those petitions are fairly traded and cease to be candidates for cumulation in the subject investigation. *E.g.* Remand Determination at 7. Furthermore, defendants state:

> it would be inconsistent for a petitioner, such as USX, that had withdrawn a petition (and thereby avoided the risk of a final negative determination by the Commission) in order to obtain the perceived benefits of a VRA, to argue at some later date that the imports covered by the withdrawn petition should be cumulated because the Commission *might* have issued a final *affirmative* determination of injury in an earlier case.

Defendants' Brief at 65.[19]

Plaintiff also argues that ITC acted in a manner contrary to law when it refused to cumulate imports from Brazil with respect to which ITC had rendered a negative injury determination in September 1984. *See Cold-Rolled Carbon Steel Sheet from Brazil,* USITC

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[17] The court does not address the standard applicable to actions governed by the 1984 Act which contains a provision mandating cumulation, on a different basis than that discussed here, of imports "subject to investigation." 19 U.S.C. § 1677(7)(C)(iv) (Supp. III 1985).

[18] Plaintiff withdrew its petition covering South African imports in May 1984, 49 Fed. Reg. 23,670 (Jun. 7, 1984), and its petition covering Spanish imports in January 1985, 50 Fed. Reg. 3949 (Jan. 29, 1985).

[19] Several commissioners have refused to cumulate the imports of South Africa and Spain subject to countervailing duty determinations because of previous countervailing duty orders concerning those import. *E.g.* Remand Determination at 60. *See Steel Products from South Africa,* 47 Fed. Reg. 39,379 (Sep. 7, 1982); *Steel Products from Spain,* 48 Fed. Reg. 51 (Jan. 3, 1983). In support of this position the commissioners argue that once duties are in effect, these imports must be considered fairly traded and "cannot logically be combined, in a decision made after the date of the order, with current unfairly traded imports as a cause of injury." *Id.*

The existence of countervailing duties does not automatically render imports "fairly traded" if the same imports have been the subject of a less than fair value determination, as imports from Spain were here. Countervailing duties are intended to offset rates of subsidization, not margins of dumping, and it is entirely possible that imports subject to such duties might still be dumped to the detriment of U.S. industry. Countervailing duties, however, may cause imports to demonstrate trends in the U.S. market distinct from those of other countries' imports. Because of the court's ruling on withdrawn petitions in the antidumping case, it is unlikely that the issue of whether relevant conditions of trade warrant cumulation as to any imports from Spain will be reached on remand.

Pub. 1579, Inv. No. 731–TA–154 (September 1984). (In support of this decision, several commissioners conclude that imports subject to a previous negative injury determination may not be considered unfairly traded and are, therefore, inappropriate candidates for cumulation. Plaintiff contends that the negative ITC determination is irrelevant to the decision whether to cumulate and that cumulation is justified based on the determination that the imports were sold at less than fair value.

As indicated, plaintiff does not dispute that the cumulation doctrine should be applied to analyze the hammering effect of less than fair value or subsidized imports only, but argues that ITC's conclusion that imports are fairly traded when the domestic industry withdraws its petitions shortly before a final determination, or where the imports were subject to a previous negative injury determination, is "an abuse of discretion, inconsistent with the purpose of the [cumulation] doctrine and contrary to basic common sense." Plaintiff's Reply Brief at 26. "[F]or the purposes of a cumulation analysis," plaintiff contends, "if the imports which are candidates for cumulation have been found to be unfairly traded by [ITA], the propriety of cumulation is determined solely by the existence of a factual connection between the candidates for cumulation and imports subject to the instant investigation." *Id.* at 28.

In order to resolve this dispute, the court must answer two questions. First, when may imports be considered "unfairly traded" so that they may be considered as candidates for cumulation analysis?[20] Second, under what circumstances do such candidates cease to be appropriate subjects for cumulation? As stated in the previous opinion, "[c]umulation is a method of assessing the volume and price effects of imports from a particular country by examining the volume and effect of imports from that country together with like imports from other countries." *USX*, 655 F. Supp. at 491 n.5. It is not in dispute that it is only appropriate to cumulate unfairly traded imports. Plaintiff apparently accepts the concept that if injury could be established by cumulating all imports, whether unfairly traded or not, then injury could be found to be caused by fairly traded imports. Such a result would seem to be contrary to both the letter and spirit of the antidumping laws, which require a causal link between unfairly traded imports and material injury to domestic industry before remedial measures may be taken. 19 U.S.C. § 1673 (1982).

A requirement that cumulated imports be unfairly traded is not, however, a requirement that all imports cumulated be causes of material injury if considered independently. This distinction is fundamental. Whether or not imports are unfairly traded for the purpose of cumulation analysis is not and cannot be the same inquiry as whether or not imports have been traded in violation of the an-

[20] Plaintiff appears to utilize the term "unfairly traded" in the sense of an ITA affirmative less than fair value or subsidy determination. Defendants use it in the sense of both the presence of margins or subsidies and causally related injury. For ease of expression, the court will use the term, hereafter, as plaintiff does.

tidumping provisions of the Act. A decision to cumulate cannot be predicated on a determination that imports from a particular source are by themselves a cause of material injury precisely because it is the purpose of cumulation doctrine to allow causation of material injury to be established in cases where the cumulated sources are not capable of being found injurious when viewed independently. Circular reasoning regarding this issue has been expressly rejected by this court on several occasions, most recently in *Fundicao Tupy S.A., et al.* v. *United States,* 12 CIT ——, Slip Op. 88–3, at 7 (Jan 12, 1988) (three-judge panel), *appeal docketed,* No. 88–1233 (Fed. Cir. Feb. 11, 1988). Thus, failure to consider cumulation if a negative injury determination has been made, where cumulation with the imports under investigation here was not addressed and rejected in the other proceeding, presents logical problems. To a lesser degree, a similar problem also exists with regard to withdrawn petitions.

It would appear that as a simple matter of logic, any imports which are found to be unfairly traded during the period of investigation, in the sense of an affirmative ITA less than fair value or subsidy determination, should be candidates for cumulation, whether such imports are the subject of a negative injury determination or a withdrawn petition.[21] As the purpose of cumulation is to avoid a negative injury determination when unfairly traded imports from various sources together injure an industry, it follows that the fewer limitations which are put on eligibility for cumulation the more likely would be the certainty of avoiding improper negative injury determinations. On the other hand, as everyone agrees, causation analysis is not an exact science. Thus, too broad a use of cumulation might result in some improper affirmative injury determinations.

Plaintiff has not cited any case in which ITC cumulated imports subject to negative injury findings or withdrawn petitions. Defendants, however, have cited several cases in which ITC has acted as it has here.[22]

It is admitted that prior to 1984 cumulation was a general concept accepted by ITC. The parameters of the doctrine of cumulation, however, were ill-defined. If one accepts the view that cumulation was a non-statutory expedient to avoid a series of negative decisions

[21] It is appropriate for ITC to decline to cumulate imports with respect to which ITA has made no determination prior to withdrawal of a petition or a negative determination, as it cannot be said and will not be determined, that such imports are unfairly traded. As indicated, plaintiff does not appear to dispute this limitation of the cumulation doctrine. It, therefore, seems inconsistent for plaintiff to argue that South African imports are appropriate subjects for cumulation because they were "unfairly traded." Plaintiff's Brief at 41–42, when ITA had not yet issued a preliminary determination at the time the petition with respect to those imports was withdrawn. Plaintiff's statement that "Commerce * * * issued [an] affirmative preliminary determination[ ] [with respect to South African imports] in March of 1984" is incorrect. *Id.* at 41. *See,* 49 Fed. Reg. 23,670 (Jun. 7, 1984).

[22] Defendants have cited one investigation governed by pre-1984 Act discretionary cumulation in which ITC expressly refused to cumulate imports subject to a previous negative injury determination, *Potassium Chloride from U.S.S.R.,* USITC Pub. 1656, at 7 n.27, Inv. No. 731–TA–187 (March 1985), and other pre-1984 Act investigations in which ITC purportedly could have cumulated certain other country imports but did not because of withdrawn petitions. *See, e.g., Leather Wearing Apparel from Uruguay,* USITC Pub. 1144, Inv. No. 701–TA–68 (May 1981) (imports might have been cumulated with those under investigation in *Leather Wearing Apparel from Brazil, Korea and Taiwan,* Inv. Nos. 701–TA–65 to –67, but were not after the petition was withdrawn with respect to those three countries. 45 Fed. Reg. 76,553 (Nov. 19, 1980)). In these latter investigations, cited by defendants, the cumulation issue was not addressed in the reasoning of the determinations. Defendants have also cited several investigations governed by the provisions of the 1984 Act (investigations initiated on or after October 30, 1984) in support of this practice. *See, e.g., Carbon Steel Structural Shapes from Norway,* USITC Pub. 1785, at 8, Inv. No. 731–TA–234 (November 1985).

where material injury was caused by a combination of imports from various sources, ITC would seem to be at liberty to define a reasonable scope to the pre-1984 doctrine of cumulation. As ITC created the doctrine, ITC could limit it in a non-arbitrary manner that is not inconsistent with the basic purpose of cumulation. Although defendants have stated the permissible scope of the doctrine too narrowly, some limits involved here are acceptable. It was not arbitrary or unreasonable to decline to cumulate imports in this investigation with those from investigations where agency determinations, particularly as to the less than fair value or subsidy aspect,[23] are not subject to testing by judicial review because petitions are withdrawn or negative injury determinations are unchallenged.[24]

Some Brazilian imports, however, may remain viable for cumulation purposes because the conclusiveness of ITA's subsidy determination in the countervailing duty investigation was not negated by the unchallenged finding of lack of causally related injury by ITC in the antidumping investigation.[25] To say that the negative injury determination in the antidumping case prevents cumulation is both to ignore cross cumulation and to read the negative injury determination in the antidumping case incorrectly as a decision resolving the issue of cumulation with Argentine imports.[26]

Two commissioners did reach the next stage of analysis and found that Brazilian imports exhibited different trends in the U.S. market distinct from those of other countries' imports. As the court stated in the previous opinion, under pre-1984 law these distinctions alone may justify a decision not to cumulate, provided such trends reflect actual differences in the way imports affect the domestic market. *USX*, 655 F. Supp. at 492. As there is no legally sustainable majority on this point, Brazilian imports covered by the countervailing duty determination must be addressed on remand.[27]

Plaintiff also challenges ITC's decision not to cumulate imports of Argentina with those of Korea. Two commissioners base their decisions not to cumulate on differences in import trends, pricing patterns and geographic markets served. These distinctions properly justify a decision not to cumulate Argentine and Korean imports. A third commissioner declines to cumulate the Korean imports because of a subsequent ITC determination that those imports threatened material injury but did not cause it.

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[23] Defendants' counsel limited its argument on this point to the lack of final affirmative injury determinations. The commissioners' concerns seem to cover all phases of the investigation.

[24] In *Cold-Rolled Carbon Steel Sheet from Brazil*, USITC Pub. 1579, Inv. No. 731-TA-154 (September 1984), it does not appear that petitioner, United States Steel Corporation (now USX) argued that the subject imports from Argentina should be cumulated with less than fair value imports from Brazil. Although petitioner instituted an action challenging ITC's negative injury determination, it voluntarily dismissed that challenge in October 1985. *United States Steel Corp. v. United States*, No. 84-11-01589 (CIT Oct. 21, 1985) (order of dismissal).

[25] ITC reached an affirmative injury determination in the countervailing duty investigation. *Certain Carbon Steel Products from Brazil*, USITC Pub. 1538, Inv. Nos. 701-TA-205 to -207 (June 1984).

[26] Defendants have not argued administrative *res judicata*, and its elements appear to be lacking here.

[27] Although an affirmative countervailing duty order with regard to Brazilian imports was issued during the period of the investigation, at least one commissioner found it too recent to affect the unfairly traded status of the goods. Remand Determination at 60. Two commissioners found the existence of a countervailing duty order grounds for not cumulating Brazilian imports, but they did not discuss timing, which appears to be relevant to a proper resolution of the issue of the effect of a countervailing duty order under pre-1984 precedent. Remand Determination at 6, 34.

Defendants argue that the subsequent threat determination establishes that the Korean imports had not actually caused any injury and that it would be inappropriate to cumulate "*actual* blows" with "*potential* blows" that did not land during the period investigated. Defendants' Brief at 80. Plaintiff responds that ITC may not base its decision not to cumulate on a threat determination which occurred after the subject investigation, and that cumulation was proper in light of ITA's determination that these imports were unfairly traded during the entire period of the instant investigation. Plaintiff's Brief at 40.

Assuming *arguendo* that the court accepts plaintiff's view as to what information may be considered on remand, the information relevant to the Korean threat determination was available prior to the original determination here. Implicit in defendants' explanation of the commissioner's decision is the concept that imports which only threaten injury affect the domestic market differently from imports which actually injure. The court is unclear, however, as to what the commissioner means in citing to a statement rejecting cumulation in arriving at a threat determination as opposed to cumulation of threatening and actually injurious imports. Remand Determination at 35 (citing *Certain Welded Steel Pipes and Tubes from Turkey and Thailand,* USITC Pub. 1810, Inv. No. 701–TA–253 (February 1986)). Thus, the issue of cumulation of Korean imports has not been resolved properly.

In sum, Mexican, Spanish and South African imports need not be a part of cumulation analysis. Cumulation of Brazilian imports subject to a countervailing duty determination and Korean imports must be addressed further.

III. Threat of Material Injury

In the previous opinion, the court held that "ITC's failure to request production capacity data for 1984 prevented it from performing a thorough analysis on the question of material threat." *USX,* 655 F. Supp. at 498. Consideration of the most recent capacity utilization data was essential, reasoned the court, because of ITC's almost exclusive reliance on this data in formulating its negative determination.

Pursuant to the court's instruction, ITC collected new evidence regarding Argentine production capacity utilization for 1984. The data showed a relatively small drop in capacity utilization, thus suggesting that Argentine producers lacked the ability to further invade the U.S. market so as to threaten imminent harm.[28] ITC concluded that this additional information confirmed their original negative finding with respect to threat.

Plaintiff argues that the capacity utilization data relied on by ITC is "inherently suspect," Plaintiff's Brief at 47, and that ITC erred in failing to rely instead on certain data which plaintiff submitted. *Id.*

[28] This issue is separate and distinct from the issue of whether present material injury was caused by Argentine imports.

at 49. An examination of the record and ITC's decision based upon that record indicate these arguments are ill-founded.

In support of its accusation that the capacity utilization data relied on was "inherently suspect," plaintiff claims that the nature of a threat investigation demands a review of quarterly data because "only capacity utilization data for the most recent period will permit a true evaluation of a real and imminent threat." *Id.* at 48. Plaintiff argues ITC erred in relying on annual figures submitted by counsel for Propulsora.

As defendants note, "the line of argument presented by USX has been rejected repeatedly by this Court and should be rejected again in this case." Defendants' Brief at 91. ITC is given broad discretion in setting the time frames for its analysis and these circumstances in no way mandate the quarterly analysis preferred by plaintiff. *E.g., American Spring Wire Corp.* v. *United States*, 8 CIT 20, 26, 590 F. Supp. 1273, 1279 (1984), *aff'd sub nom. ARMCO, Inc., et al.* v. *United States*, 760 F.2d 249 (Fed. Cir. 1985). Furthermore, reliance on customary annual data is especially warranted in this case given seasonal fluctuations in production levels which would likely skew the reliability of quarterly figures.[29]

Plaintiff finally argues that ITC's negative determination regarding threat of material injury cannot be upheld in light of evidence it submitted to ITC which "unequivocally demonstrated the existence of significant excess production capacity among Argentine producers of cold rolled sheets in 1984." Plaintiff's Reply Brief at 34. The court disagrees. Although the *Mercado* article, *supra* n.29, provides a general overview of the problems facing the Argentine steel industry in early 1985, it does not, along with the other public information submitted by plaintiff, provide sufficient evidence to find that ITC's conclusion, drawn from sufficiently recent data collected specifically on the products under investigation in this case, was not based on substantial evidence.

This matter is hereby remanded to the ITC for further consideration consistent with this opinion. ITC shall file its decision on remand within 45 days hereof. Plaintiff will have 15 days from filing to respond. Defendants may reply within 10 days thereafter.

SO ORDERED.

[29] Evidence of these seasonal fluctuations is contained in an article entitled "The Steel Crisis" published in the March 1985 issue of *Mercado*, which was submitted into evidence by plaintiff. Public Record Document Number 86, at Ex. 1. The article contains the statement by Fernando Freytes, general manager of Propulsora Siderurgica that "[s]ince the months of December and January are traditionally low with regard to production levels due to seasonal factors, in general, the companies will continue to experience high percentages of idle capacity in their plants." *Id.* at p. 2.

ABSTRACTED CL

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASS
				Item No
C88/46	Rao, J. March 14, 1988	Endicott Johnson Corp.	87–12–01203	Item 700. 37.5%
C88/47	DiCarlo, J March 14, 1988	Border Brokerage Co.	79–4–00654	Item 664. 5%
C88/48	DiCarlo, J March 14, 1988	Border Brokerage Co.	80–1–00214	Item 692. 5%
C88/49	DiCarlo, J March 14, 1988	Border Brokerage Co.	80–1–00217	Item 664. 5% Item 680. 9.5%
C88/50	DiCarlo, J. March 14, 1988	Border Brokerage Co.	80–7–01195	Item 692. 5%
C88/51	DiCarlo, J. March 14, 1988	North American Foreign Trading Corp.	82–4–00531	Items 715. 720.02, 67¢ eac 36¢ eac or 11.9%
C88/52	DiCarlo, J. March 15, 1988	Border Brokerage Co.	78–6–01181	Item 692. 5%

LASSIFICATION DECISIONS

SESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
lo. and rate	Item No. and rate		
0.57	Item 700.56 6%	Agreed statement of facts	New York Athletic footwear
4.10	Item 666.00 Free of duty	S. Madill, Ltd. v. U.S., Ct. No. 77-12-04978	Blaine Parts for Madill Skidder Towers
2.16	Item 666.00 Free of duty	S. Madill, Ltd. v. U.S., Ct. No. 77-12-04978	Blaine Parts for Madill Skidder Towers
4.10 0.30	Item 660.00 Free of duty	S. Madill, Ltd. v. U.S. Ct. No. 77-12-04978	Blaine Parts for Madill Skidder Towers
2.16	Item 666.00 Free of duty	S. Madill, Ltd. v. U.S., Ct. No. 77-12-04978	Blaine Parts for Madill Skidder Towers
5.15, 716.18, 2, 720.34 ch, 59¢ each ch, or 12.7%, 9%	Item 688.36 5.3% or 5.1%	Agreed statement of facts	New York Electronic LCD or LED clocks
2.16	Item 666.00 Free of duty	S. Madill, Ltd. v. U.S., Ct. No. 77-12-04978	Blaine Parts for Madill Skidder Towers

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